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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No .2

BAYSIDE FISH FLOUR COMPANY, APPELLANT,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED JANUARY 29, 1935.

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INDEX.

	Original	Print
Record from D. C. U. S., Northern California	1	1
Bill of complaint	1	1
Exhibit "A"—Excerpts from fish and game code	24	19
Exhibit "B"—Fish packers license	28	24
Exhibit "C"—Letters patent No. 1,501,775	29	24
Exhibit "D"—Statement showing sardines taken by canners and use made thereof	30	25
Affidavit of R. L. Daily	31	26
Exhibit "A"—Report of Fish and Game Commission, February 14, 1934	37	31
Affidavit of Edward David	38	32
Joseph G. Gisler	41	34
John R. Grigg	43	35
E. W. Lockwood	46	38
E. T. Meekin	48	39
Y. Worrall	50	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1935.

—6944-C

	Original	Print
Exhibit "A"—Agreement of October 9, 1933	53	42
Motion to dismiss	54	43
Memorandum of points and authorities	55	43
Opinion, St. Sure, J.	58	46
Order granting motion to dismiss	62	50
Order vacating order of August 31, 1934, and granting motion to dismiss	63	50
Petition for appeal	64	51
Points and authorities	66	52
Assignments of error	67	52
Order allowing appeal	75	53
Bond on appeal (omitted in printing)	76	
Præcipe for transcript of record	78	54
Clerk's certificate (omitted in printing)	79	
Citation and service (" " ")	80	

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA

In Equity.

No. 3721-S.

BAYSIDE FISH FLOUR COMPANY, a Corporation, Plaintiff,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, U. S. WEBB AND JOHN L. FARLEY, Defendants

BILL OF COMPLAINT FOR INJUNCTION—Filed May 12, 1934

Now comes the plaintiff, above named, and complains of the defendants, above named, and for cause of action, alleges:

I

This suit is brought in a court of equity in the United States and the jurisdiction of the court is asserted and claimed for, that the plaintiff is threatened with and subjected to the irreparable harm, injury and damage hereinafter set out and are without adequate remedy, except in a court of equity. This suit is brought for injunction and other equitable relief.

II

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California and a citizen of the United States and a resident of the State and Southern Division of the Northern District of California.

III

That the above entitled suit arises under the Constitution and laws of the United States, within the meaning of Sub-
[fol. 2] division First of Section 24, of the Judicial Code, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, to wit: the sum of Sixty-Five Thousand ($65,000.00) Dollars.

IV

That, in and by the Constitution of the United States, Article 1, Section VIII, Clause 3, it is provided:

"The Congress shall have power, . . .

"3. To regulate commerce with foreign nations and among the several states and with the Indian Tribes."

That the defendants seek to, and do, arbitrarily and unreasonably interfere with the commerce clause of the Constitution above set forth as will hereinafter in this bill of complaint more particularly and at large appear.

V

That the above entitled suit is also one arising under the laws of the United States regulating commerce, within the meaning of Subdivision Eight of Section 24 of the Judicial Code, and that said defendants seek to, and do, arbitrarily and unreasonably interfere with the laws of the United States regulating commerce as will hereinafter in this bill of complaint more particularly and at large appear.

VI

That the above entitled suit is also one authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, and of any right secured by any law of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States, within the meaning of subdivision Four-
[fol. 3] teenth of Section 24 of the Judicial Code, and that said defendants seek to, and do, arbitrarily and unreasonably deprive, under color of law, statute, ordinance, regulation, custom and usage of the State of California, of a right, privilege and immunity, secured by the Constitution of the United States, to wit: the right lawfully to engage in commerce between the several states and with foreign nations, and said defendants seek to, and do, deprive the plaintiff of equal rights secured to the citizens of the United States, as will hereinafter in this bill of complaint more particularly and at large appear.

VII

That the above-entitled suit is also one authorized by law to be brought by any person requesting an interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State to restrain the action of any officer of such State in the enforcement or execution of a statute, or the enforcement or execution of an order of an administrative board or commission acting under and pursuant to the statutes of such State, upon the ground of the unconstitutionality of such statute where irreparable loss or damage will result to the complainant unless a temporary restraining order is granted by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, within the meaning of Section 266 of the Judicial Code, U. S. C., Title 24, Section 380, and that said defendants seek to, and do arbitrarily and unreasonably construe and attempt to enforce an unconstitutional statute of the State of California; to wit, Article 4, General Commercial Regulations, Sections 1060 and 1077 inclusive, of the Fish and Game Code, of the State of California, effective August 31, 1933. (Copy of which is attached hereto and made a part hereof and marked Exhibit "A".)

[fol. 4] VIII

This is a controversy arising under the constitutions and laws of the United States, in that the complainants allege and aver and claim that sections 1064, 1065 and 1076 of "An act to establish a Fish and Game Code therein revising and consolidating the law relating to Fish and Game and other wild life and repealing certain provisions of law therein specified." Chapter 73 passed by the Legislature of the State of California and approved April 11, 1933, and in effect August 21, 1933, are in contravention of and violate Paragraph 3, Subdivision 8, Article 1 of the Constitution of the United States, conferring upon Congress the exclusive power to regulate commerce within foreign nations and among the several States and with the Indian Tribes, paragraph 2 of Article 6 containing the following provision:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties

made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Article 1, of the Fourteenth Amendment to the Constitution of the United States, contains the following provision:

"1. Who are citizens.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Complainants further claim that the said Fish and Game [fol. 5] Code, or Act, of the Legislature of the State of California, and especially the sections hereinbefore set out, if so construed as to deny the plaintiff the relief prayed for in this bill, violates portions of Section 13 and 14 of the Declaration of Rights, Article 1, of the Constitution of the State of California, in the following language:,

"No person shall be deprived of life, liberty or property without due process of law and private property shall not be taken or damaged for public use without just compensation having first been made to the owner."

And, also, Section 25, Nineteenth, Article 4 of the State of California, in the following language:

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

Nineteenth: Granting to any corporation or association or individual, any special or exclusive right, privilege or immunity."

And, also, Section 11 of Article 1 of the Constitution of the State of California containing the following language:

"All laws of a general nature shall have a uniform operation."

Also, Section 21 of Article 1 of the Constitution of the State of California containing the following language:

"No special privileges or immunities shall ever be granted which may nor be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

And, also, Section 3 of Article 1 of the Constitution of the State of California, containing the following language:

[fol. 6] "The State of California is an inseparable part of the American Union and the Constitution of the United States is the supreme law of the land."

Plaintiff further alleges that those sections of Article 4, General Commercial Regulations of the Fish and Game Code of the State of California, are unconstitutional, discriminatory and violative of the Constitution of the State of California and of the United States, hereinbefore above referred to, as such construction deprives plaintiff of its property without due process of law and grants to canning corporations special privileges and denies to this plaintiff the equal protection of the law, insofar as Sections 1064, 1065 and 1076 thereof makes it unlawful to use any fish or part thereof, except fish offal by reduction process used in the manufacture of an edible product, to wit, fish flour fit for use, intended for use and actually used for human consumption from sardines lawfully taken and shipped into the state from outside the three mile limit of the state, during an open season and the reshipping of said product manufactured from said sardines in foreign and interstate commerce, and further making the use of said reduction process a nuisance and punishment by a fine of not more than $500.00 or by imprisonment in the County Jail for not to exceed six months or both, and abating said building or place where said food product is manufactured for a period of one year under Sections 1065, 1076 and 1410 of said Act.

IX

That the plaintiff, Bayside Fish Flour Company, is a corporation engaged in the exclusive business of purchasing fresh or raw sardines from fishermen domiciled in the

States of Oregon and Washington and catching fish upon the High Seas of the Pacific Ocean beyond the three mile limit of the State of California and after said fish are brought within the State of California, then manufacturing an edible product, to wit, fish flour for human consumption [fol. 7] from the meat of said sardines. That other fishermen who also bring their product within the State of California, sells same to sardine canners and processers who ship their product in interstate and foreign commerce. That this plaintiff only manufactures and sells its product, to wit, fish flour, for use in foreign and interstate commerce and only operates its said plant during the open season when the other canners and/or processers are permitted to take sardines, to wit, from August 1st to February 15th, from the waters of the State of California and when it is lawful to bring sardines within the State of California. At no time does this plaintiff's product, to wit, fish flour, become intermingled with intrastate commerce.

That the history of sardines shows that they have no value as a food product in their natural state and that the greater majority of the food product canned by the sardine canners is put up in one pound oval cans. That said sardines are used, after canning by a class of people of a lower grade than the people of the State of California; that their greatest value is evident after being packed and shipped in interstate and foreign commerce to those parts of the United States and foreign countries where such sardines cannot be obtained. That during the sardine season, this plaintiff employs between six and eight sardine fishing purse sein- boats, employing approximately 100 fishermen and 25 to 30 employees in its plant.

X

Plaintiff also shows unto the court that sardines used by it, and the one pound oval canners, of the State of California, is a migratory fish of such a nature that its real place of incubation is not with certainty known even to the most expert fish catchers. Sardines are found from the lower part of Mexico up as far as Alaska and as far as Japan, to the west; and, as far as is known to science, the said sardines spawn upon the open seas and are found in [fol. 8] unlimited numbers in the Pacific Ocean outside of the three mile limit of the State of California.

XI

Plaintiff shows unto the Court that the Bayside Fish Flour Company, plaintiff, contracted during the season 1933-34, beginning August 1, 1933, and ending the 15th day of February, 1934, to purchase sardines from various fishermen residing in the States of Oregon and Washington, and also contracted to sell, transport and deliver to various purchasers in the United States and also in Germany and Holland, fish flour to be used for human consumption manufactured from sardines to be purchased from the above referred to fishermen. That the said contracts were based upon valuable considerations and the delivery of said sardines to this plaintiff was necessary so plaintiff could supply the demands of its business in interstate and foreign commerce, and that it will be necessary for this plaintiff to again enter into contracts with fishermen from the States of Washington and Oregon to purchase sardines from them for the coming season 1934-35, beginning August 1, 1934 and ending February 15, 1935, and unless plaintiff can obtain the supply of sardines under contract with fishermen, its business will be destroyed, its plants rendered valueless, its business ruined and its employees thrown out of employment.

That it is also necessary for this plaintiff to enter into contracts for the sale of its commodities in other states and foreign countries before the beginning of the said 1934-35 season, and it further becomes necessary for this plaintiff to make improvements and additions upon its plant approximating $10,000.00 before said plant can operate during the next open 1934-35 sardine season, and said contracts must be entered into at this time or it will be too late to begin next season's operations and if plaintiff is prohibited from entering into said contracts for its supply [fol. 9] of sardines now, the canners will have contracted for all fishing boats and there will be no fishing boats available to supply plaintiff's plants.

XII

That defendants herein actually interfered with the performance of contracts between this plaintiff and their fishermen during the month of January, 1934, and enjoined this plaintiff from fulfilling the obligations of and performing its contracts; also, said defendants herein have tempo-

rarily enjoined this plaintiff from doing business for the next ensuing sardine fishing season, beginning August 1, 1934 and ending February 15, 1935, and will abate this plaintiff's property for a period of one year and prohibit it from conducting its business and entering into new contracts and performing the same, unless restrained by this court; that all of the above acts of said defendants are based upon their construction of the fish and game laws, which construction is in violation of the Federal Constitution hereinbefore set forth.

That the fishing grounds, wherein all of the sardines are caught by the fishermen, who deliver said sardines to plaintiff, are located in that portion of the Pacific Ocean, three miles beyond the San Francisco Bay and in which fishing ground there are numerous outside floating plants operating and taking fish for straight reduction purposes in the manufacture of non-edible products only, and that the said Fish and Game Commission of the State of California maintains a patrol to see that the fishermen furnishing fish to the outside reduction plants do not catch sardines within the three mile coastal limits of the State of California.

XIII

The plaintiff shows unto this Court that the Bayside Fish Flour Company was at all times ready, willing and able [fol. 10] to comply with its contracts with the fishermen for the purchase of sardines and with the purchasers of its commodities, but that if it attempted to do so, it would have been held in contempt of court and subject to fine and imprisonment.

Plaintiff shows unto the court that if the Sections of said Fish and Game Code, especially Sections 1064, 1065, 1076 and 1410, are valid, the plaintiff, Bayside Fish Flour Company, its agents, servants, employees and property will be subject to a fine of not more than $500.00 or *by* imprisonment in the County Jail for not to exceed six months, or both and also have its plant closed down and abated for a period of one year, by reason of which the plaintiff, its agents and servants would suffer irreparable harm and damage.

XIV

The plaintiff shows onto the court that the construction placed by the Fish and Game Commission upon Sections

1064, 1065 and 1076 violates the 14th Amendment to the Constitution of the United States, hereinbefore set out in that the people of the State of California will not permit this plaintiff to manufacture a product for human consumption by a reduction process, either with or without a permit; these sections prohibit this plaintiff from taking sardines unless they are operating a canning or packing plant within the State of California and giving this right to other residents of the State, while it does permit the canners of one pound oval cans to take sardines from the waters of the State of California and purchase sardines from fishermen bringing them from the Ocean and beyond the three mile limit of the State of California, with no limitation upon the number of sardines said canners can take from said waters; and said acts of the people of the State of California violates the 14th Amendment to the Constitution of the United States in that the plaintiff is denied the rights and immunities of citizens, *are* denied the equal protection of the law, and *are* deprived of its property without due process of law.

[fol. 11] Plaintiff shows unto the court that the said Bayside Fish Flour Company could only operate a canning plant in the State of California at a great loss, as the canning of one pound oval cans cannot now, and has not for a number of years, been a profitable one, but that said canners only make a profit out of their by-products, to wit, meal and oil and practically always run their canning plants at a loss.

Complainant shows unto the Court that Sections 1060, 1064, 1065 and 1076 of said Act are further unconstitutional, in that they attempt to compel the Bayside Fish Flour Company to pack sardines in one pound oval cans in California at a loss to it as a condition precedent to its making and filling contracts in foreign and interstate commerce.

Plaintiff further shows onto the Court that there is nothing contained in the Fish and Game Code or any other law of the State of California, prohibiting the importation of sardines, or the sale of fresh sardines or commodities manufactured therefrom, from becoming the subject of barter sale and trade and to become articles of interstate and foreign commerce.

Said Fish and Game Code, Article 4, violates the 14th Amendment to the Constitution of the United States, and

permits this plaintiff to only acquire the same in the State of California, provided it put sardines, in a tin can; said Act violates the 14th Amendment to the Constitution of the United States, in that plaintiff is forbidden to put sardines, after process, in a flour sack; that for the same reason said Act, of the Fish and Game Code, violates the Sections of the Constitution of the State of California, herein referred to.

Plaintiff further shows onto the Court that said Article 4, General Commercial Regulations, Sections 1060 to 1077 inclusive, violates the commerce clause of the Constitution of the United States, in that said section imposes a direct [fol. 12] burden upon interstate commerce; that said sections were not passed to conserve the natural resources of the State of California, because said Act does not prohibit the natural resources of the state, to wit, both the sardines and the commodities manufactured therefrom, to become the subject of interstate barter and commerce and to pass from the State of California; but that the effect and purpose of the Act is to compel the packing and manufacturing of said sardines in tin cans inside of the State of California, which requirement has no relation to a proper exercise of the police power of the State by the Legislature of the State of California; has no relation to a conservation of the natural resources of the state, but that said Article, and sections contained therein, is unreasonable, unlawful, arbitrary and was provided for the purpose of compelling the packing and processing of one pound oval cans of sardines and inhibiting other forms of processing, thereby directly burdening interstate commerce; that therefore, said sections, of Article 4 of the Act violates the Commerce Clause of the Constitution as well as the 14th Amendment thereto and those provisions of the Constitution of the State of California herein referred to.

Plaintiff further shows onto the Court that said sections violates the 14th Amendment of the Constitution of the United States, as well as the various sections of the Constitution of the State of California referred to herein and the Commerce Clause of the Constitution of the United States, in that the effect and purpose of Article 4, Sections 1064 to 1076 inclusive is not only to impose a direct burden upon interstate and foreign commerce, but to create a

monopoly in the manufacture and sale of sardines and place the same in the hands of a number of canners who put sardines in one pound oval cans; that the necessary effect of the Act will be to reduce the market price of the raw sardines and to increase in interstate commerce the price of the finished by-product, fish meal and fish oil; and that said Article 4, and Sections contained therein, was [fol. 13] placed upon the statutes of the State of California for that and no other purpose, was intended to and will have the effect of burdening interstate commerce by increasing the price of the finished by-products to the ultimate consumer and creating a monopoly in the one pound oval canners. That said Article 4 and Sections 1060 and 1076 inclusive, further violates the 14th Amendment to the Constitution of the United States, in that it deprives plaintiff of its right to contract and purchase sardines and ship its finished product and by-products in interstate and foreign commerce.

XV

Plaintiff further shows unto the Court that Article 4, General Commercial Regulations of the Fish and Game Code, violates the 14th Amendment to the Constitution of the United States, as well as the declaration of rights to the Constitution of the State of California, in that in the enforcement of the law corporations and/or persons residing within the State of California, who are engaged in the business of canning and shipping one pound oval cans and their by-products with the full knowledge of the officers of the law charged with the enforcement of the act, are permitted to ship their commodities out of the state and into interstate and foreign commerce, and that the law is only intended to be and sought to be enforced against corporations like the plaintiff operating only a fish flour plant within the State of California. That such one pound oval canners are knowingly permitted and allowed to evade the Fish and Game Code, because the Fish and Game Commissioners do not require the one pound oval canners to have a reduction or extraction permit to put sardines in one pound oval cans and also permits the one pound oval canners to take all the sardines they want from the waters of the State of California, or bring in from the waters outside of the limits of the State of Cali-

fornia, all the sardines they want without limitations [fol. 14] upon the take, and that they also permit the canners of sardines using one pound oval cans to take 32½% of all of the sardines received by them and used for straight reduction purposes; and in addition thereto, they permit the one pound oval canners to use 50% as offal and further they only require said canners to pack 13.5 cases of sardines per ton of fish after deducting the percentage referred to in the said Fish and Game Code and discriminates in every way, shape and form, in favor of the one pound oval canners of sardines and against this complainant.

Plaintiff shows that the Fish and Game Code not only violates the Constitution of the United States in the articles hereinbefore set out, but violates the same as well as the Constitution of the State of California, in administration and enforcement thereof.

XVI

During the sardine season beginning August 1, 1933 and ending February 15, 1934, plaintiff operated a food manufacturing plant located at Point San Pablo, Richmond, Contra Costa County, California, under a "Fish Packers and Wholesale Shell-Fish Dealers License," No. 138, issued to it by the State of California and counter-signed by the President of the Fish and Game Commission and the State Controller under and in conformance with Section 1010 of the Fish and Game Code (Copy of which license is attached hereto, made a part hereof and marked Exhibit "B" said Section 1010 of the Fish and Game Code reading as follows):

"Every person must procure a license for each plant or place of business to engage in the business of:

(a) Canning, curing, preserving or packing fish, taken from the waters of this State or brought into this State in a fresh condition.

(b) Manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal.

(c) Dealing in mollusks or crustaceans by wholesale."

[fol. 15]

XVII

That the defendants, J. Dale Gentry, Earl B. Gilmore and I. Zellerbach, are members of the Fish and Game Commission of the State of California.

XVIII

That the defendant U. S. Webb, as Attorney General of the State of California, and John L. Farley is Executive Officer of said Fish and Game Commission.

XIX

That fresh sardines are not in and of themselves a valuable article of food generally used for human consumption, and that the only use made of the said sardines is to process said sardines and put them in one pound oval cans and other containers and manufacture from the offal of said fish, fish meal, fish scrap and fish fertilizer, for other than human consumption, and the said fresh sardines are never at any time used by the People of the State of California, in such condition as a food product. Neither do the People of the State of California use a material percentage of the sardines after they are processed, but practically all of said processed products are shipped out of the State of California in both foreign and interstate commerce, to wit, ninety-seven and one-half (97½%) percent of the one pound oval cans, and all of the fish flour for human consumption manufactured by the plaintiff; seventy-five (75%) percent of the fish oil and fifty (50%) percent of the fish meal, fish scrap and fish fertilizer for use other than for human consumption.

XX

That defendants threaten to and do prevent plaintiff from receiving and using fresh sardines, so lawfully taken from the Pacific Ocean and outside of the three mile limit of the waters of the State of California and threaten to and will close the Richmond plant of this plaintiff if it does not [fol. 16] desist from receiving and using said sardines purchased from fishermen lawfully caught outside of the State of California and brought within the state and said fishermen will sell said fish to other processers of sardines if prohibited from selling same to this plaintiff.

Plaintiff also alleges that the several sections of the Fish and Game Code of the State of California, appertaining to sardines, do not prevent the receiving and shipping of sardines or commodities manufactured therefrom, in interstate and foreign commerce, nor do they prohibit the using of sardines lawfully caught outside of the State of California in the manufacture of food products. That the acts of said defendants in endeavoring to restrain, and in fact restraining, plaintiff from receiving and using sardines and manufacturing a product for human consumption therefrom, is directly contrary to the provisions of Article 4, General Commercial Regulations of the Fish and Game Code of the State of California. That said defendants under color of their unconstitutional interpretation of the laws of the State of California, to wit, Article 4, General Commercial Regulations, Sections 1060 to 1077 inclusive of the Fish and Game Code, effective August 21, 1933, seek to and do deprive the plaintiff of a right, privilege and immunity secured by the Constitution of the United States, to wit, Article 1, Section 8, Clause 3 of the Constitution of the United States, the right to engage in foreign and interstate commerce, and Article 14, Section 1 of the Fourteenth Amendment of the Constitution of the United States, abridging the privilege and immunity of a citizen of the United States and denying to this plaintiff equal protection of the laws therein.

That the action of said defendants in endeavoring to restrain, and in restraining, plaintiff from using sardines in the manufacture of a product fit for and used for human consumption is working and will continue to work a great hardship upon it and will continue to deprive it of the free [fol. 17] and unrestricted use of its property and will injure their manufacturing business to such an extent as to ruin and deprive it entirely of their said manufacturing business and throw said corporation into bankruptcy, by lawfully enjoining said plaintiff from operating its Richmond plant which was just built and completed during September, 1933, at an approximate investment of Sixty-Five ($65,000.00) Thousand Dollars.

XXI

That plaintiff during the 1933-1934 open season, beginning August 1, 1933 and ending February 15, 1934, purchased from fishermen, sardines caught outside of the three

mile limit of the boundary of the State of California, and upon the high seas, and manufactured a product fit for and used only for human consumption from said sardines at its plant located at Point San Pablo, Richmond, California. That said product manufactured from the said sardines purchased from fishermen, who had an absolute property right in said sardines caught upon the high seas, was all sold and shipped in Interstate and Foreign Commerce, and at no time was the said commodity, or sardines, intermingled with the intrastate commerce of the State of California.

That the supply of sardines furnished to plaintiff's plant and the commodity manufactured therefrom, were not taken from the waters of the State of California, and was all intended for the interstate and foreign business of the Bayside Fish Flour Company, plaintiff herein and, if prevented in the future from obtaining such sardines, caught upon the high seas and beyond the jurisdiction and control of the State of California, and further prevented from manufacturing a product for use as human consumption from said sardines, the business of plaintiff will be totally destroyed and its plant will be of no value.

XXII

There is located within the boundaries of the State of California approximately twenty sardine canning com- [fol. 18] panies using sardines purchased from the same class of fishermen supplying plaintiff's manufacturing plant in the manufacture of a product for human consumption and that practically all of said product is shipped out of the State of California in interstate and foreign commerce, to wit: between ninety-five (95%) percent and ninety-seven and one-half (97½%) percent. That the plaintiff is the only company manufacturing fish flour for use for human consumption, and all of plaintiff's commodity is shipped out of the State of California and in foreign and interstate commerce.

XXIII

That the twenty canning companies putting up sardines in one pound oval cans prepare their meat for canning by cutting off the heads and tails of said sardines which heads, tails and other offal is manufactured into fish meal and fertilizer of which approximately fifty percent is shipped out of the State of California in foreign and interstate com-

merce. That plaintiff, through a patented process, U. S. Letters Patent No. 1,501,775, dated July 15, 1924, (Copy of which is attached hereto and made a part hereof and marked Exhibit "C") also eliminates all deleterious matter from said sardines and uses said offal in the manufacture of fish meal for other than human consumption and ships fifty per-cent of said fish meal, not fit for human consumption, in foreign and interstate commerce. That the said canning companies also manufacture a fish oil from the sardines purchased by them and ships approximately seventy-five (75%) percent of said fish oil out of the State of California and in foreign and interstate commerce, and plaintiff also ships approximately seventy-five (75%) percent of its fish oil in foreign and interstate commerce.

XXIV

That for a great number of years, or approximately from the year 1915 to date sardines have been taken from the waters of the State of California and from the high seas [fol. 19] contiguous thereto and to date there are no signs of depl*a*tion, and all of the commodities manufactured from said sardines have been, and now are, shipped and used in foreign and interstate commerce and that only a negligible amount of the commodities manufactured by said sardine canners are consumed within the State of California.

XXV

That the sardine Reduction Act, or the General Commercial Regulations, Article 4, Sections 1060 and 1077 inclusive, of the Fish and Game Code, effective August 21, 1933, Chapter 73 "An act to establish a Fish and Game Code, therein revising and consolidating the law relating to fish and game and other wild life, and repealing certain provisions of law therein specified", is a subterfuge and not an Act designed for the purpose of conserving the sardines caught within the boundaries of the State of California, or brought within the State of California, from the high seas and beyond the three mile limit of the State of California, but said Act is designed wholly for the purpose of limiting the use of said sardines for canners of one pound oval cans and prohibiting the use of sardines by other manufacturers of food products from said sardines and for the particular purpose of discriminating in favor of said one pound oval

mnaufacturers. That there is no limitation on the amount of sardines that the one pound oval canners may take from the fisheries of the State of California, and that during the last two open sardine canning seasons, 1932-33 and 1933-34, to and including February 15th, the one pound oval canners took 468,677 tons of sardines from the fisheries of the State of California, and they only used 67,090 tons of sardines in the manufacture of a food product put up in one pound oval cans and that they actually used 401,577 tons of sardines to manufacture their by-products (See Exhibit "D" attached hereto and made a part hereof).

[fol. 20]

XXVI

Notwithstanding plaintiff's willingness to pay all charges, licenses and taxes lawfully imposed and to comply with all other valid rules, regulations or requirements, defendants if not enjoined will prevent plaintiff from taking or acquiring during the open season when sardines are permitted to be taken from the waters of the State of California, sardines taken and/or caught upon the high seas beyond the jurisdiction of the State of California, to plaintiff's great and irreparable loss.

XXVII

Plaintiff further alleges that the construction as placed by defendants upon the laws of the State of California, to wit: "An act to establish a Fish and Game Code, therein revising and consolidating the law relating to fish and game and other wild life, and repealing certain provisions of law therein specified," effective August 21, 1933, and the several subdivisions of Article 4, General Commercial Regulations, by which they seek to prevent, and to prevent, the plaintiff from purchasing sardines from fishermen who catch said sardines on the high seas of the Pacific Ocean and beyond the three mile limit of the State of California, and after the purchase thereof, using said sardines in the manufacture of a product for use only for human consumption and after said manufacture shipping all of said commodity in foreign and interstate commerce, and permitting one pound oval canners the right to take and use, with limitation, sardines to put in tin cans and shipping them in foreign and

interstate commerce, is arbitrary, class legislation and unreasonable and in violation of the Commerce Clause of the Constitution of the United States, to wit: Article 1, Section VIII, Clause 3.

XXVIII

Plaintiff further alleges that great and irreparable injury will result to plaintiff unless a restraining order be granted [fol. 21] without notice to defendants enjoining the defendants and each of them, their agents and servants from interfering with the lawful conduct of plaintiff's business as aforesaid, pending the further order of this court.

XXIX

That plaintiff is without any adequate remedy at law for the grievances, wrongs and injuries so practiced upon it and threatened to be practiced upon it by the defendants as hereinbefore mentioned and are and will be entirely remediless without the equitable interposition of this Honorable Court.

Wherefore, plaintiff prays judgment:

(1) That said defendants and their officers and agents, and each of them, be restrained by injunction from interfering with the lawful contracting for and purchasing of sardines during the open season in the State of California, lawfully caught by fishermen on the high seas of the Pacific Ocean and beyond the three mile limit of the State of California, and be enjoined from stopping this plaintiff from using said sardines in the manufacture of a product for use for human consumption, to wit, fish flour manufactured from said sardines so lawfully caught by fishermen and sold to this plaintiff, and that defendants be further enjoined from making or filing any criminal complaint or enforcing and/or issuing any restraining orders or injunctions prohibiting the operation of said manufacturing plant at Point San Pablo, Richmond, Contra Costa County, California, and interfering with the lawful pursuit of plaintiff's business as aforesaid.

(2) That a temporary restraining order be granted unto plaintiff without notice to defendants enjoining the defendants and each of them and their employees and servants,

from interfering with the lawful purchase of sardines caught by fishermen on the high seas over those portions of the Pacific Ocean beyond the three mile limit of the [fol. 22] State of California; and from enjoining or enforcing any restraining order or temporary injunction against said plaintiff from taking and using said sardines in the manufacture of a product, to wit, fish flour for human consumption out of fresh sardines so lawfully purchased and caught during the open season and that said defendants and each of them be further enjoined from making or filing any criminal complaint or issue any warrant of arrest, or arresting plaintiff, or any of its agents, servants and employees and enforcing any restraining order or injunction prohibiting the plaintiff in the conduct or lawful pursuit of its business as aforesaid.

(3) That in addition to the matters and things prayed for in this bill of complaint that Honorable — —, United States District Judge, presiding in the above entitled court, to which said court the above entitled cause is duly and regularly assigned for hearing and disposition immediately call to his assistance to hear and determine the application for an interlocutory or preliminary injunction two other judges as required by the provisions of Section 266 of the Judicial Code, U. S. C. Title 28, Section 380.

(4) For such other and further relief as to the court may deem just and equitable.

Roy Daily, Attorney for Plaintiff.

[fol. 23] *Duly sworn to by G. Worrall. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" TO BILL OF COMPLAINT

Fish and Game Code

Article 4. General Commercial Regulations.

1060. As used in this article:

(a) "Reduction plant" means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products.

(b) "Packer" means any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking.

(c) "Fish offal" means the heads, viscera, and other parts of fish taken off in preparing for canning or preserving.

1061. The commission may regulate and control fishing boats, barges, lighters or tenders, receptacles or vehicles containing fish, commercial fishermen, packers, reduction plants, plants where fish products are manufactured, and dealers in fish, mollusks, or crustaceans, or fishery products, in so far as necessary to insure the taking and delivery of fish and fishery products in a wholesome and sanitary condition to canning, packing or preserving plants, or to any plant where fishery products are manufactured, or to any fresh fish dealer, and to prevent deterioration and waste of fish.

1062. The commission may enter and examine any canning, packing, preserving or reduction plant, or place of business where fish or other fishery products are packed, preserved, manufactuerd, bought or sold, or any fishing boat, barge, lighter, tender, or vehicle or receptacle containing fish, and ascertain the amount of fish received, or kind and amount of fishery products packed or manufactured and the number and size of containers or cans for fishery products purchased, received, used, or on hand.

1063. The commission may establish grades for different varieties of fish or fishery products, which grades must be conformed to be fishermen who deliver fish or other fishery products to packers or to fresh fish dealers. Every packer of fish, or fish dealer, or manufacturer of fish products, must conform to the grades established by the commission.

1064. It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this State, or brought into this State, or to take, receive or agree to receive more fish than can be used without deterioration, waste or spoilage. Except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a reduction process.

1065. Sardines may be taken for use in a reduction plant, or by a packer, only in accordance with the provisions of

this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter-pound or [fol. 25] square cans less than 10 ounces in net weight; provided, that in a ten-ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans. (Amended by Ch. 706, Stats. 1933.)

(Original Section)

1065. Sardines may be taken for use in a reduction plant, or by a packer, only in accordance with the provisions of this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A and 21, between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of packing in cans commonly known as quarter pound or square cans less than a half pound in net weight.

1066. Any person engaged in canning sardines may take and use in a reduction plant thirty-two and one-half per cent of the amount of sardines actually received at such canning plant during each calendar month.

1067. In determining percentage of sardines used for reduction purposes by canneries it shall be deemed that a ton of sardines suitable in size and condition for canning will produce 960 one-pound oval cans of sardines, or the equivalent if other size cans are used.

1068. The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish. (Amended by Ch. 706, Stats. 1933.)

(Original Section)

1068. The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the com-

mission may prescribe, to take and use fish by a reduction or extraction process for the manufacture of edible products fit for and intended to be used for human consumption. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish.

1069. Repealed by Ch. 467, Stats. 1933.

(Original Section)

1069. No reduction permit shall be granted unless at least fifty per cent of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured within this State into products fit for and intended to be used for human consumption.

1070. Persons engaged in preserving sardines by the common methods of drying, salting, smoking or pickling may use in a reduction plant or by reduction process such sardines, or fish delivered mixed with sardines, as are unfit for drying, salting, smoking or pickling, which are not intentionally taken into the plant in a condition unfit for processing for human consumption.

1071. Fish which are mixed with sardines when delivered to the packer are the equivalent of sardines and in- [fol. 26] cluded with the percentage of the total amount of sardines received by the packer during the calendar month.

1072. All chutes or conveyors used to convey fish or fish offal to any receptacle, and all receptacles containing fish or fish offal to be used for reduction purposes, must be so constructed and maintained that the fish or fish offal thereon or therein is at all times open to view and inspection.

1073. Each packer must, on or before the fifth day of each calendar month, file with the commission a written report, under oath, on such form as may be prescribed by the commission, containing a statement of the amount of fish received at each of his plants during the preceding calendar month. The report must also state the amount of fish packed and the number and size of the containers of fish, fishery products and by products packed, produced or reduced at each plant during said preceding calendar month.

1074. A written complaint may be made to the commission against any person who violates any of the provisions of this article, or any regulation made thereunder, by any person having information or knowledge of such a violation. The complaint must be filed with the commission and shall set forth the particular offense alleged to have been committed. A copy thereof must be served on the alleged offender, together with a notice setting forth the time and place of hearing. The hearing must be held in the county in which the violation is alleged to have been committed. The person charged must answer the complaint, in person or by attorney, within five days after notice has been served upon him. If the person charged fails to answer or denies the charge, the hearing shall be conducted by the commission. If the person charged is found guilty of the offense charged, the commission may suspend for a period not to exceed ninety days any license issued by any State board or officer to such person to take, buy, sell, can or preserve fish or fishery products. No other license shall be issued to such person during such period of suspension.

1075. The commission or any person appointed by it to conduct a hearing may, in any investigation or hearing held under the provisions of this article, cause the deposition of witnesses, residing within or without the State, to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this State, and may compel the attendance of witnesses and the production of documents and papers.

1076. Any reduction plant in which any fish or any part thereof is used in violation of the provisions of this article, or in violation of any rule, regulation or order of the commission, is a nuisance. Whenever the existence of such nuisance is shown to the satisfaction of the superior court of the county in which the reduction plant is situated, by complaint filed in the name of the people of the State of California, the court may issue a temporary injunction to abate and prevent the continuance or recurrence of such nuisance. If the existence of a nuisance is established in an action, as provided herein, an order of abatement shall be entered as part of the judgment in the case, which order shall direct the closing, for twelve months, of the building

or place where such nuisance was maintained, and, during such time, said building or place shall be and remain in the custody of the court.

1077. The commission may make and enforce such regulations as may be necessary or convenient for carrying out any power, authority or jurisdiction conferred under this article.

[fol. 27] 1410. The commission of any act declared by this code to be unlawful, or the violation of any provision of this code or of any rule or regulation made thereunder, unless otherwise provided herein, is a misdemeanor, and is punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not to exceed six months, or by both.

458. It is unlawful to transport or carry out of this State any deer or game bird, or parts thereof, except when transported for scientific or propagation purposes under a written permit issued by the commission.

[fol. 28] EXHIBIT "B" TO BILL OF COMPLAINT

Value, $5.00 No. 138

This License Expires June 30, 1934

Citizen Fish Packers and Wholesale Shell-Fish Dealers License

Having paid the amount required by law, license is hereby granted to

Bayside Fish Flour Company,

Street and No: 625 Market. City: San Francisco,

to can, cure, preserve or pack fish which are taken in the waters of this State, or fish brought into this State in a fresh condition, or to manufacture fish-scrap, fish-meal, fish-oil, chicken-feed or fertilizer from fish or fish offal, or to deal in mollusks or crustaceans by wholesale.

Ray L. Riley, State Controller.

Countersigned:

J. Dale Gentry, President Fish and Game Commission.

Issued by J. J. S. at S. F. Office, on Aug. 30, 1933.

(Here follows photolithograph, side folio 29.)

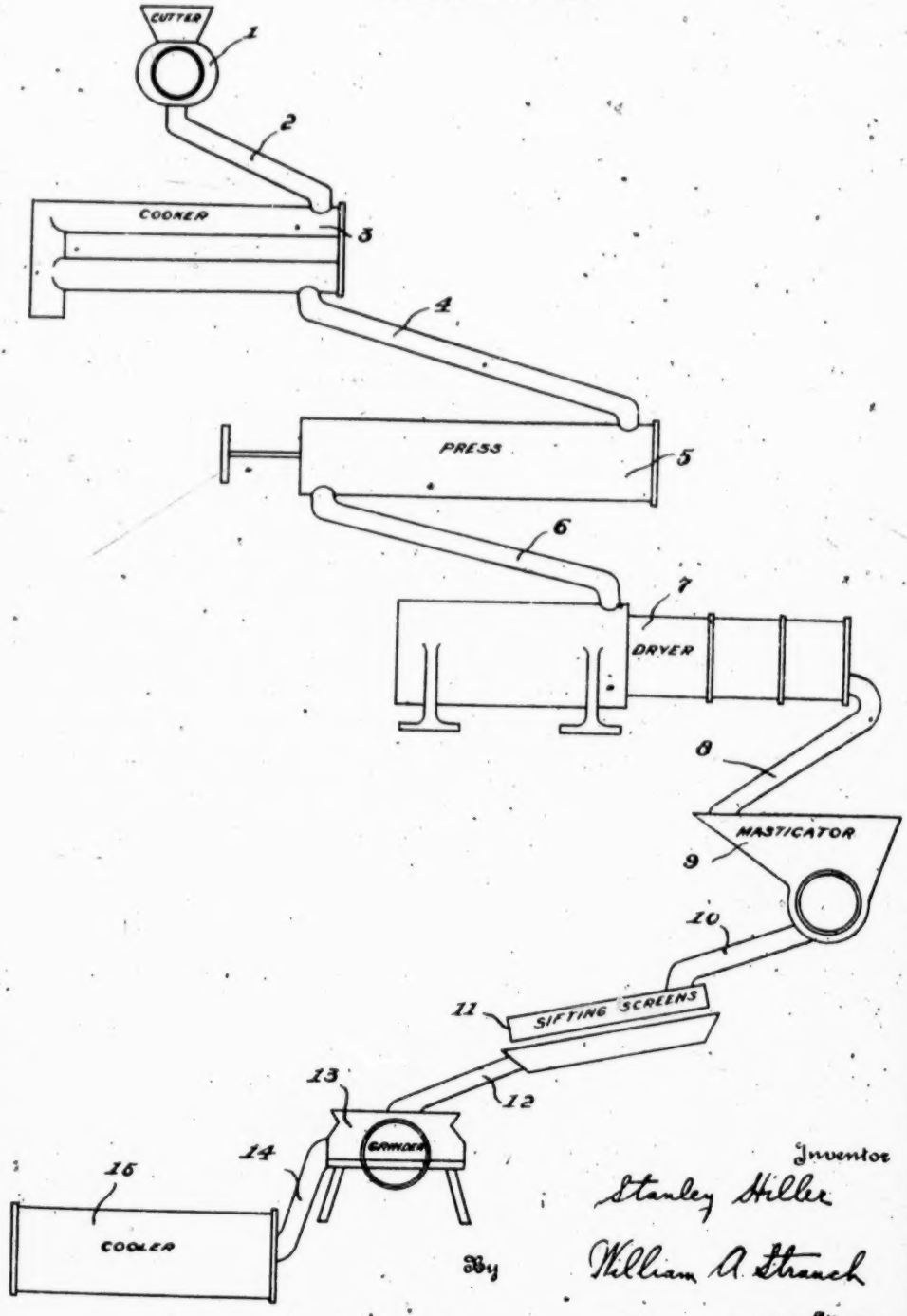
EXHIBIT "C" TO BILL OF COMPLAINT 24A

July 15, 1924. 1,501,775

S. HILLER

PROCESS FOR THE MANUFACTURE OF HIGH GRADE FLOURS FROM FISH AND LIKE MATERIALS

Filed Jan. 14, 1924



Inventor
Stanley Hiller

By William A. Stranch

29 275-1 Attorney

Patented July 15, 1924. 1,501,775

UNITED STATES PATENT OFFICE.

STANLEY HILLER, OF SAN JOSE, CALIFORNIA, ASSIGNOR TO ROY L. DAILY, OF SAN FRANCISCO, CALIFORNIA; R. B. BELLINGALL, OF OAKLAND, CALIFORNIA; AND STANLEY HILLER, OF SAN JOSE, CALIFORNIA.

PROCESS FOR THE MANUFACTURE OF HIGH-GRADE FLOURS FROM FISH AND LIKE MATERIALS.

Application filed January 14, 1924. Serial No. 686,136.

To all whom it may concern:

Be it known that I, STANLEY HILLER, a citizen of the United States, and a resident of San Jose, county of Santa Clara, State of California, have invented certain new and useful Improvements in Processes for the Manufacture of High-Grade Flours from Fish and like Materials, of which the following is a specification.

The present invention relates to improved processes for the manufacture of high grade flours from fish and like materials.

More particularly the invention relates to improvements in processes of the character described by which a food fit for human consumption may be produced.

Heretofore meal from fish, fish waste and like oil bearing materials has been produced by first extracting the oils and thereafter drying and grinding the residue. Such meals have, however, been of a quality unfit for human consumption and have been usable only as fertilizers and cattle food. In particular fish meals heretofore produced have had a percentage of bone content so high that the meal would be highly injurious if used as a food for human beings.

I have discovered that it is possible to effect a commercially satisfactory and practical separation of the bone content in fish or other bone bearing materials of the character described with the result that a flour may be produced which is of high protein content and valuable as food for human beings.

The success of the separation depends to a large extent upon the manner of treating the meal in production thereof. However, the manner of treatment may vary widely as will appear more fully hereinafter.

The main feature of the invention may be said to comprise the preparation of a meal of such quality that the bone remains in more or less appreciable sections or lengths which may be so treated as to remove the flesh portion easily from the pieces of bone; and at the same time or thereafter, reducing or breaking the flesh from the bone. After the breaking of the flesh content the mass is then passed over a set of sifting screens to separate the dried flesh and bone, or may be passed through chambers for separating the flesh from the bone by an air flotation process, or otherwise.

The accompanying drawing shows in diagram the apparatus and general arrangement thereof as used in commercial practice to carry out one form of the invention. It is to be understood however that many other arrangements may be utilized. In the preferred forms the invention is carried out in continuous manner, but it is also applicable to batch processes.

In carrying out the invention, the fish are first preferably cleaned, the heads and other parts cut off, and the entrails removed. This preliminary cleaning and treatment, however, is not essential and may be dispensed with in certain cases, as for example in handling certain kinds of fish. The fish is then fed into a cutter 1, which is in practice of the commonly known meat grinder type, but may be of any well known form for reducing and cutting the fish into relatively small parts. From the cutter the fish is carried by means of a conveyor 2, or otherwise, and delivered into a cooker 3. The mass is then cooked, under pressure, to break down the oil cells. In practice material is fed from the cutter continuously and under cover to the cooker, and is continuously passed through the pressure cooker. From the cooker the cooked material is passed through a conveyor or otherwise to a press (5) where the greater proportion of oil and water is extracted by pressure.

In practice the material is passed from the cooker to the press continuously under cover, and while hot. The material also passes continually through the press, and as a result of pressing the material while hot a greater efficiency of extraction of the oils results. From the press the material passes through passage (6) or otherwise to a dryer (7) and is therein thoroughly dried in a manner to prevent burning or otherwise tainting the taste of the meal. In practical operation the feed from the press to the dryer is continuous and under cover, and the passage through the dryer is continuous, drying being carried out in direct contact with the gases of combustion.

The volume of air supplied to the combustion chamber and the arrangement of the chamber is such, however, that complete combustion of the fuel supply occurs and the temperature of the mixture of air and gases is maintained at a point to cause drying of the pressed material without burning. In this manner, efficient and thorough drying of the material is carried out in direct contact with the products of combustion, but without causing any appreciable degree of taint affecting the taste of the dried material.

From the dryer, the thoroughly dried and preferably hot material is conveyed through (8) or otherwise, preferably in continuous manner and under cover, to a masticator (9). Masticator (9) is preferably of any well known type such for example as is used on farms and as manufactured by the International Harvester Company, and comprises a series of rotating dogs which act on the dry material to break up the dry flesh portion thereof and to separate it from the bone. The bone being hard and the flesh being thoroughly dry and more or less brittle, the result of the mastication is that the flesh is separated and reduced to relatively fine particles while the bone remains in relatively large particles. It will be understood that any treatment which produces this result may be used to replace the masticator described, and that although greater efficiency is attained in mastication while the material is hot because greater dryness is assured, so long as the result described is effected the condition of the material during the operation may differ widely within the scope of the invention.

Having passed through the masticator, the dry and preferably hot mixture of fine dry flesh content and relatively coarse bone content is treated to effect a sufficient separation of the bone and flesh so that the flesh becomes usable as food for human consumption. This treatment or step may be carried out in different ways, and although preferably carried out while the material is hot for greater efficiency, so long as the separation is effected the condition of the material may vary widely in this respect and also with respect to the degree of dryness maintained.

The material is passed preferably under cover and continuously through (10) or otherwise to separating means (11). In practice (11) comprises shaking or rotary screens of a mesh which permits the major part of flesh portions to pass therethrough and prevents the passage of the major part of the bone. In practical operation a 20-mesh screen is utilized. The screens are pitched downward from the feed end so that the material is advanced there-across and is then passed from the screens where it may be further treated and sacked to be used as fertilizer, being substantially composed of the bone content.

The sifted flesh content is collected beneath the screens and is passed through (12) or otherwise to a grinder (13), where it is reduced to a flour. The sifting and grinding operations are preferably continuous and carried out under cover to avoid loss of material, and to maintain the material as far as possible in warm or heated condition, in this manner contributing to the commercial success and efficiency of the process.

The invention may however, be carried out in discontinuous manner and as a batch process, without the covering to avoid waste and to maintain the heated condition of the material.

The sifting screens may be replaced by means for introducing the meal from the masticator into a device for separating the flesh content from the bone by means of air currents or air flotation. In this form of separator the difference in density of the relatively fine flesh particles and the relatively coarse bone is utilized to effect the separation.

From this separator the flesh portion is also passed to a grinder and reduced to flour. In the preferred embodiment, the flesh part is sifted and ground while hot and the material is passed from the grinder through passage (14) or otherwise, to a cooler (15) where it is cooled to the point of permitting immediate sacking or other packing for shipment.

It will be understood that for handling large quantities of material rapidly and at a minimum cost, a continuous plant is provided. For smaller quantities, the invention may be carried out as a discontinuous or batch process. The arrangement for handling the material while hot and maintaining the material covered, at least until drying is completed, prevent offensive odors and rapid deterioration of the material during the treatment, in addition to increasing the economy of operation and efficiency of the apparatus. After the material has been dried there is found in practice no tendency toward rapid deterioration, and no offensive odors are emitted. Covering of the material from this point on to prevent contact with the air serves however, to keep it hot and thoroughly dry, thereby increasing the efficiency of the mastication, sifting or other separation apparatus, and the final grinding into flour.

It will be understood that by bringing the various apparatus into close relation, conveyors may be largely eliminated and gravity feed arrangements may be utilized, in which event the covering may be to some extent removed if desired, without mate-

rially lowering the temperature of the materials in the various stages. It is to be understood that the arrangements of apparatus for conveying the materials will depend largely on the design of the plant used and may accordingly be varied widely according to the choice made and well within the range of ordinary engineering skill.

Having described preferred embodiments of the invention, what is desired to be secured by Letters Patent and claimed as new is:

1. A process for manufacturing fish flour which comprises cutting the fish; cooking the fish under pressure; pressing the cooked fish to extract the oil therefrom; drying the solid residue from the press; masticating the dried material without substantially reducing the size of the bone particles whereby the flesh is broken from the bone; and treating the masticated material to remove the major portion of the bone content therefrom.

2. A process for manufacturing fish flour which comprises cutting the fish into relatively small particles; cooking the cut fish; pressing the cooked fish to extract the oil therefrom; drying the solid residue from the press; treating the dried material in a manner to break the flesh content from the bone without materially reducing the size of the bone particles; and separating the flesh content from the bone content.

3. A continuous process for manufacturing high grade fish flour which comprises the steps of cutting fresh fish to relatively small particles; cooking the freshly cut fish; pressing the cooked fish while hot to extract the oil therefrom; drying the solid residue from the press by the application of heat thereto; treating the dried material while hot to break the flesh portion from the bone without materially reducing the size of the bone particles; separating the flesh content from the bone by sifting; and grinding the separated flesh content to produce flour.

STANLEY HILLER.

[fol. 30]

EXHIBIT "D" TO BILL OF COMPLAINT

Sardines Taken by Canners and Use Made Thereof

Compiled from Statistical Report Prepared by California Fish and Game Commission

	Tons of sardines taken	Tons actually used for canning	Tons into offal, heads and tails	Tons used under 32½%, Sec. 1066	Tons used under permits, Sec. 1068	Tons used by canners for non-edible
1933–34 Season 2/15.....	284,566	46,658	46,657	44,929	146,322	237,908
1932–33 Season 2/15.....	184,101	20,432	20,765	19,567	123,337	163,669
	468,667	67,090	67,422	64,496	269,659	401,577

Only 14.3% of sardines taken by one-pound oval canners was used to manufacture a food product and 85.7% was used for straight reduction purposes.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. L. DAILY ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

R. L. Daily, being first duly sworn, deposes and says:

That he is an attorney at law licensed to practice law within the State of California, and as such attorney has represented the Bayside Fish Flour Company in that capacity continuously from the year 1924 to date. That also, during part of that period of time, he has been an officer, director and stockholder of said company and is thoroughly familiar with the business and plants of the said Bayside Fish Flour Company.

That he is one of the owners of U. S. Letters Patent No. 150775, dated July 15, 1924, issued by the United States Patent Office, which is a process patent for manufacturing fish flour for human consumption out of sardines. That the said Bayside Fish Flour Company is operating under said patent and has been operating under said patent since the date of issue during the year 1924. That he has studied and is thoroughly familiar with what is termed in the California laws as the Sardine Reduction Act, the alleged object [fol. 32] of which act was to conserve the sardines of the State of California for the use and benefit of the People of the State of California for food purposes. That under the act existent during the year 1925 it was necessary for the said plaintiff to procure a permit from the Fish and Game Commission to manufacture by reduction process fish flour for human consumption, and that he represented the said plaintiff at the hearing held by the Fish and Game Commission of the State of California, who issued a permit to plaintiff for the purpose of using sardines to manufacture fish flour for human consumption. That testimony, both oral and written, was furnishel to the Fish and Game Commission, acting as a quasi judicial body, and said Commission found that the fish flour manufactured by this plaintiff is fit for human consumption and will in fact be used for human consumption. That thereafter, every

year, this plaintiff, under the then existing acts, filed applications with the Fish and Game Commission and said Commission continuously found, from evidence introduced before it, that the plaintiff was manufacturing a product fit for and used for human consumption. That in addition to the documentary evidence furnished to the Fish and Game Commission, consisting of affidavits of use as well as other documentary evidence, the Commission itself made numerous investigations in Europe through the American Counsels and foreign Counsels and in each and every instance the evidence furnished to them as a result of their independent investigation disclosed the fact that the product manufactured by plaintiff was all used for human consumption. The Department of Pure Foods of the State of California also made independent investigations for and on behalf of the Fish and Game Commission, and they also sustained the Findings of Fact found by the said Commission, to the effect that the product manufactured by the plaintiff was fit for use for human consumption, and over a period of ten years, after many independent investigations, the Fish and Game Commission have never found that the [fol. 33] plaintiff's product is not fit for use, intended for use or in fact used for human consumption. That during the year 1930, on October 27th, the People of the State of California filed an action in the Superior Court of the County of Monterey against this plaintiff, said action being numbered 12351, alleging that this plaintiff was conducting a reduction plant and was not a packer as was defined in the then existing laws. Said definitions of the act at that time reading as follows:

"Reduction plant means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products.

Packer means any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking."

That the definition of "reduction plant" and "packer" in the now existing act is the same as was in the act and referred to in the proceedings in the County of Monterey, and in that proceeding Judge H. G. Jorgenson, Superior Judge, found in his Findings of Fact and Conclusions of Law that the said plant where fish flour was manufactured

by this plaintiff was not a reduction plant and also that the said plaintiff was a packer as defined in the reduction act of the State of California. Said Findings of Fact and Conclusions of Law and judgment were entered on January 12, 1931.

That on the strength of this Finding of Fact and Conclusions of Law, which case was not appealed by the State of California and became final between the parties thereto, this plaintiff then entered into contracts to purchase machinery and lease a building at Point San Pablo, Richmond, California, for the construction of a new plant, which plant was completed and began operations during the month of September, 1933, at an approximate cost of Sixty-Five Thousand ($65,000.00) Dollars for machinery, equipment and leases. Said company having been advised by affiant that the questions between the People of the State of California and this plaintiff were res adjudicata as to the Monterey plant, and that said decision would be tantamount to [fol. 34] stare decisis or equivalent to a rule of property, and upon such advice from affiant the above new investment was made and factory built and operated. Affiant is personally familiar with the mode of manufacturing or processing sardines in one pound oval cans by the sardine canners of the State of California, and the methods used by such cannners in using the sardine reduction plant as a subterfuge for the purpose of taking sardines for reduction purposes only. That the following table is the table used by practically all of the cannners within the State of California and approved by the Fish and Game Commission.

They use — a basis a 2,000 pound per ton wet weight figure to begin with.

One ton sardines 2,000 pounds.

32½% under Section 1066, which is 650 pounds.

Balance after percentage deducted	1,350 pounds
Cutting away heads and tails 50%	675 pounds
Balance to be processed for canning	675 pounds

There is contained in a one pound can of sardines only 13 ounces of sardines and two ounces of tomato sauce, or whatever other sauce is used. The sardine canners are only packing 13.5 cases of sardines per ton. (See report of Fish and Game Commission dated February 14, 1934, attached hereto and marked Exhibit "A").

Thus, using this basis of computation, out of every raw ton of fish taken by the one-pound oval canner, only 526½ pounds goes into food for human consumption, the balance of the moisture content of the fish being divided into water which goes up into steam and oil, which goes into the by-products manufactured by the sardine canner, or on a wet weight basis for each ton received by the canner 1,325 pounds is used to manufacture by-products and 675 pounds is used to manufacture the food products.

The one-pound oval canner also this year was granted by the Fish and Game Commission an additional 6,000 tons [fol. 35] of sardines to go into products for other than human consumption.

During the open season 1932-33 the one-pound oval sardine canners received 184,101 tons of raw sardines. They only used for canning 20,432 tons. Thereby, under the subterfuge and guise of the reduction act, they used 163,669 tons of sardines to manufacture products for other than human consumption, or practically eighty-nine per cent of all of the sardines taken by the one-pound oval canning processors was used by them to manufacture products for other than human consumption, and a similar state of facts has existed for the past ten years in the construction and enforcement of this conservation act by the Fish and Game Commission of the State of California.

In addition to the offal tonnage and percentage allowance and reduction permits issued to the one-pound oval canners during the 1933-34 season, affiant has been informed and upon such information and belief states that the Fish and Game Commission permitted the various canners to transfer tonnage back and forth between themselves from canners who did not use the full 6,000 tons allowed them under additional permits, and the Fish and Game Commission refused to permit the Pittsburg canners to transfer to the Bayside Fish Flour Company at their Richmond plant tonnage in a similar manner permitted between one-pound oval sardine canners.

As a result of a Restraining Order obtained by the Fish and Game Commission against this plaintiff in Contra Costa County against its Richmond plant, the credit of such plant has been impaired to such an extent that it is impossible to meet its present existing obligations, because of its inability to secure commercial credit, and that if this re-

straining order remains upon the plant it will force this plaintiff into bankruptcy and completely destroy the business of its Richmond plant. That before the next operating season, beginning on August 1, 1934, it becomes neces-
[fol. 36] sary for this plaintiff to make contracts with fishermen, contracts to sell their output and expend money in placing the plant in condition for operation for next season, amounting to approximately five or ten thousand dollars, and unless the defendants are restrained from interfering with this plaintiff, this said plaintiff will be irreparably damaged to such an extent that it can never recover therefrom, because the People of the State of California do not have to put up a bond to reimburse this plaintiff for any damage or loss it might incur in connection with the injunction requested by them. In addition to the foregoing damage, this plaintiff has built up a good will in Europe for the sale of its commodity and has expended several thousands of dollars, to wit, approximately Twenty-Five Thousand ($25,000.00) Dollars, in building up said good will, and if there is a discontinuance of the business, it is affiant's belief that the plaintiff will lose all of said European connections which loss cannot be restored to it.

That plaintiff uses 37½% of all the sardines received by it in the manufacture of a food product and only 62½% of the raw fish, consisting of the offal and deleterious matter, is used in the manufacture of by-products for use for other than human consumption.

(Sgd.) Roy Daily.

Subscribed and sworn to before me this 1st day of May, 1934.

(Sgd.) C. R. Holton, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[fol. 37] EXHIBIT "A" TO AFFIDAVIT

State of California

Department of Natural Resources

Division of Fish and Game

San Francisco

February 14, 1934.

To Sardine Canners of California:

During the month of January, 1934, 35,081 tons of sardines were delivered to canneries and reduction plants at Monterey, Richmond, Benicia and Pittsburg. 186,968 cases of 1# oval cans and 23,215 cases of other size cans equivalent to 23,646 cases of 1# oval cans were packed. 5,099 tons of meal and 1,172,333 gallons of oil were produced. In the same district, for this season to January 31, 160,035 tons of sardines have been delivered to shore plants; 848,193 cases of 1# ovals and 105,129 cases of other size cans equivalent to 108,426 cases of 1# ovals were packed; 23,201 tons of meal and 5,202,552 gallons of oil were produced.

In the San Pedro district during January, 21,626 tons of sardines were delivered, 81,667 cases of 1# oval cans and 78,441 cases of other size cans equivalent to 77,023 cases of 1# oval cans were packed; 3,375 tons of meal and 503,317 gallons of oil were produced. In the same district for the season to January 31, 67,162 tons of sardines were delivered, 245,866 cases of 1# oval cans and 160,037 cases of other size cans equivalent to 160,246 cases of 1# oval cans were packed; 10,679 tons of meal and 1,761,516 gallons of oil were produced.

For the season to January 31 in Monterey and Northern California 71,031 tons were used for canning purposes, 88,896 tons for manufacture of oil and meal by reduction process and 108 tons for salting and pickling. In the San Pedro district to January 31, 29,177 tons were used for canning and 37,985 tons were used by reduction process for manufacture of oil and meal.

Following is the record of case pack per ton of fish received at canneries which packed sardines in January:

Benicia Fisheries, Inc.,	Benicia	.046
F. E. Booth Co.,	Pittsburg	13.5
F. E. Booth Co.,	Monterey	13.5
California Packing Corporation,	"	13.5
Custom House Packing Corporation,	"	13.5
Del Mar Canning Corporation,	"	13.5
E. B. Gross Canning Co.,	"	13.5
Hovden Food Products Corporation,	"	13.5
Monterey Canning Co.,	"	13.5
San Carlos Canning Co.,	"	13.5
San Zavier Fish Packing Co.,	"	13.5
Sea Pride Packing Corp. Ltd.,	"	13.5
Coast Fishing Co.,	Wilmington	13.5
French Sardine Co.,	Terminal Island	13.5
Italian Food Products Co.,	Long Beach	13.6
Sea Pride Packing Corp. Ltd.,	Terminal I.	13.5
Southern California Fish Corp.,	"	41.00
Van Camp Sea Food Co. IP Plant,	"	13.5
Van Camp Sea Food Co. NK Plant,	"	15.7

S. D. Dado, Assistant, Bur. of Coml. Fisheries.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDWARD DAVID ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
County of Monterey, ss:

Edward David, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of Monterey, Monterey County, California, and is at present and has been for a period of more than five years, president of the Del Mar Canning Company, Monterey, California, engaged in the business of canning sardines; that in conjunction with the canning plant of the Del Mar Canning Company they have a reduction plant in operation which they use in connection with the by-products of such plant, to wit, fish meal, fish scrap, fish fertilizer and fish oil; that

said products so manufactured are now and always have been used only for purposes for other than human consumption; that he is familiar with all of the other canning plants located in Monterey and he knows of his own knowledge that they operate in a similar manner to the reduction plant operated by the Del Mar Canning Company, and that without exception all of said reduction plants manufacture [fol. 39] a product unfit for human consumption.

That affiant is familiar with the process used by the Bayside Fish Flour Company in the manufacture of its fish flour fit for use for human consumption. That the process used by the plaintiff is different than the process used by all of the reduction plants of the canning companies that affiant is familiar with, and that plaintiff is now and has been for the past ten years the only firm within the State of California that manufactures a product for human consumption from the meat of sardines and used to make a fish flour for use for human consumption, and that such process used by plaintiff is different than the process used by reduction plants in the manufacture of products not for human consumption.

That during the past five years that affiant has been connected with the sardine business, he estimates that practically all of the canned sardines, towit, about 90% of said sardines, are shipped outside of the State of California, and in interstate and foreign commerce, and that only a negligable part of said canned sardines are used by the People of the State of California, within the State of California.

That in the process or manufacture of canning one-pound oval cans the heads, tails and offal of the sardines are eliminated before processing or putting said sardines in one-pound oval cans. That all of the heads, tails and offal taken from the sardines are used by the canners in the manufacture of fish meal, fish scrap, fish fertilizer and fish oil. That in addition to said offal, the canners also take a percentage of their catch and run through their reduction plants in manufacturing a commodity for other than human consumption. That this percentage under the present act is thirty-two and one-half per cent of the total catch, and that of all the sardines caught and used by the canners of

the State of California more than fifty per cent goes to the [fol. 40] reduction plant of the canners and is used for purposes other than for human consumption, including offal, etc.

Edward David.

Subscribed and sworn to before me this 26th day of April, 1934.

John O. Thompson, Notary Public in and for the County of Monterey, State of California. (Seal.)

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOSEPH G. GISLER ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Joseph G. Gisler, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California, and that he is familiar with the fishing conditions existing in and around the Pacific Ocean three miles on the high seas of the Pacific Ocean and outside of the Golden Gate, San Francisco Bay, State of California; that he has particularly been engaged in the business of employing fishermen for the outside reduction plants and that in the operation of the business of the outside reduction plants for the manufacture of products other than human consumption there are employed numerous fishing boats fishing for sardines and delivering said sardines to the said outside reduction boats. That the Fish and Game Commission of the State of California operates a patrol to see that none of the fishermen fishing on the high seas for sardines fish within the waters of the State of California within three miles of the coast line. That this one patrol

boat is sufficient to police the said waters three miles out [fol. 42] from the coast of the State of California and it is a practicable thing for the Fish and Game Commission to patrol the waters and see that fishermen do not take sardines within the waters of the State of California.

That affiant knows of his own knowledge that the outside reduction plants have averaged during the past two years more than fifty thousand tons of sardines per year for the manufacturing of a product for other than human consumption, and that said product so manufactured is practically all brought within the State of California, and either used in the State or shipped out of the State of California.

Other than this affiant sayeth not.

(Sgd.) Jos. G. Gisler.

Subscribed and sworn to before me this 28th day of April, 1934.

(Sgd.) C. R. Holton. Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN R. GRIGG ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John R. Grigg, being first duly sworn, deposes and says:

That he is the president of the Pittsburg Canners, Inc., and for a period of more than ten years has been engaged in the sardine business; that in conjunction with the canning plant of the Pittsburg Canners, Inc., they have a reduction plant which they use in connection with the by-products of such plant, to wit, fish meal, fish scrap, fish fertilizer and fish oil; that said products so manufactured are now and always have been used only for purposes other

that human consumption; that he is familiar with other canning plants located in California and he knows of his own knowledge that they operate in a similar manner to the reduction plant operated by the Pittsburgh Canners, Inc., and to the best of his knowledge all of said reduction plants manufacture a product unfit for human consumption.

That affiant is familiar with the fish flour manufacturing plant of the plaintiff located at Point San Pablo, Rich- [fol. 44] mond, California, and said plant is used for the manufacture of a very fine fish flour which has extensive possibilities for use as a food product for human consumption; that the process used by the plaintiff for the manufacture of fish flour is a patented process and is not used in any of the plants of the canning companies that affiant is familiar with, and that plaintiff is now and has been for the past ten years the only firm within the State of California that, to the best of affiant's knowledge and belief, manufactures a fish flour product fit for human consumption.

That affiant is familiar with the fishing conditions off the coast of California at both Monterey and San Francisco Bay, and he knows of his own knowledge that the California Fish and Game Commission keeps a patrol boat off the three-mile limit of the State of California to ascertain how much fish are caught within the three-mile limit. That this one patrol boat has been doing this business for the past two years for the particular reason that there are now and have been what is termed floating reduction plants operating outside of the three-mile limit, taking and using approximately between fifty thousand and seventy thousand tons of sardines per year in the manufacture of a product for other than human consumption, and that said reduction ships bring their fish meal, fish scrap, fish fertilizer and fish oil within the State of California and sell the same and trans-ship the same out of the State of California.

That during the past ten years that affiant has been connected with the sardine business, to the best of his own knowledge, practically all of the canned sardines are shipped outside of the State of California, and in interstate and foreign commerce, and that only a negligible part of said canned sardines are used by the people of the State of California, within the State of California; to the best of

his knowledge that approximately one-half or fifty per cent of all fish meal manufactured by the sardine canners [fol. 45] in the State of California is shipped out of the State and is not used by or for the people of the State of California. That approximately seventy-five per cent of all of the fish oil manufactured out of the offal and percentage allowance allowed to canners is shipped out of the State of California and is not used by or for the people of the State of California.

That in the process or manufacture of canning one-pound oval cans the heads, tails and offal of the sardines are eliminated before processing or putting said sardines in one-pound oval cans. That all of the heads, tails and offal taken from the sardines are used by the canners in the manufacture of fish meal, fish scrap, fish fertilizer and fish oil. That, in addition to said offal, the canners also take a percentage of their catch and run through their reduction plants in manufacturing a commodity for other than human consumption. That this percentage under the present act is thirty-two and one-half per cent of the total catch, and during the past two years that of all the sardines caught and used by the canners of the state of California more than fifty per cent goes to the reduction plants of the canners and is used for purposes other than for human consumption.

That while he has been connected with the sardine industry in manufacturing, selling and operating reduction plants in California and Alaska that all of said reduction plants are used by the canners for manufacturing commodities to be used for purposes other than human consumption, and in the vernacular of the sardine canning industry this term, by-products, refers to products not to be used for human consumption.

Other than this affiant sayeth not.

John R. Grigg.

Subscribed and sworn to before me this 11th day of May, 1934.

Lillian Ralston, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

My commission expires March 27, 1936.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF E. W. LOCKWOOD ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

E. W. Lockwood, being first duly sworn, deposes and says:

That he is at present, and has been for the past ten years, employed by the Wilbur-Ellis Company, importers, exporters and brokers, who now are and have been for a number of years engaged in selling sardine products, particularly fish oil and fish meal for other than human consumption, and that in the course of his duties he has investigated the figures relative to the amount of such commodities manufactured out of sardines by the canners and oil and meal producers of the State of California, and that he knows of his own knowledge that approximately one-third of the nineteen hundred and thirty-three and nineteen hundred and thirty-four production of fish meal has been shipped outside of the State of California into foreign and interstate commerce. Also that all of the fish flour manufactured by the Bayside Fish Flour Company for human consumption is shipped outside the State of California and in [fol. 47] foreign and domestic commerce; affiant also knows that practically 75% of the fish oil manufactured by the canners and fish oil and fish meal producers of the State of California is shipped outside of the State of California in interstate and foreign commerce.

E. W. Lockwood.

Subscribed and sworn to before me this 25th day of April, 1934.

Lillian Ralston, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF E. T. MEEKIN OF BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

E. T. Meekin, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California, and is at present and has been for the past ten years, an officer and stockholder of the California Press Manufacturing Company, who manufacture machinery for reduction plants used in connection with the manufacture of by products from sardines by the sardine canners of the State of California and Alaska. That he is very familiar with practically all of the reduction plants used by the canners in the State of California and the territory of Alaska, and to his knowledge, there is not one reduction plant used to manufacture fish meal, fish scrap, fish flour or fish fertilizer, for human consumption; that it is common knowledge and the vernacular of the phrase reduction plant, amongst the sardine canning business, that the terms fish meal, fish sardines, fish flour, fish fertilizer, etc., is always used in conjunction with non-edible products not used for, [fol. 49] intended to be used for human consumption. That the only plants manufacturing fish flour for human consumption that affiant has any knowledge, are the plants operated by the Bayside Fish Flour Company.

That affiant is familiar with the fish flour manufacturing plant of the Bayside Fish Flour Company located at Point San Pablo, Richmond, California, and that said plaintiff's plant does not use the same process in its entirety as is used by reduction plants for manufacturing commodities other than for human consumption.

Other than this affiant sayeth not.

E. T. Meakin.

Subscribed and sworn to before me this 30th day of April 1934.

(Sgd.) Lillian Ralston, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF Y. WORRALL ON BEHALF OF PLAINTIFF IN SUPPORT OF PRELIMINARY INJUNCTION—Filed May 12, 1934

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Y. Worrall, being first duly sworn, deposes and says:

That she is the Assistant-Secretary of the Bayside Fish Flour Company, and as such officer, is familiar with the bookkeeping and working of the said corporation.

That the Bayside Fish Flour Company is engaged exclusively in the business of manufacturing fish flour for use for human consumption and during the fishing season ending on February 15, 1934, had contracts with fishermen domiciled in the States of Oregon and Washington, to wit:

Name	State	Boat
Captain Carl Carlson	Washington	Lorenz
Captain Mike Sunich (Copy of contract attached hereto and marked Exhibit "A")	Washington	Excellent
Captain Sandanger	Washington	Edgar "C"
Captain H. Olsvik	Washington	Limit
Captain R. Jensen	Washington	Wisconsin

That said fishermen caught sardines outside of the three [fol. 51] mile limit of the State of California and delivered them to the Bayside Fish Flour Company at its Point San Pablo, Richmond, California, plant, and that there was only used in said plant, sardines caught beyond the three mile limit.

That the said Bayside Fish Flour Company ships all of its fish flour out of the State of California in foreign commerce, to wit, to Germany and Holland and that none of said commodity is used within the State of California; that there are approximately one hundred fifty people directly and indirectly employed at the Point San Pablo plant.

That the said Fish and Game Commission of the State of California, through the Attorney General of the State of California, stopped the plaintiff from operating its plant and prohibited them from receiving fish from the fishermen

above referred to as per their agreement, and that it will be necessary for the said Bayside Fish Flour Company to again contract with the above referred to fishermen for the coming season of 1934-35, and it will also be necessary to expend approximately Ten Thousand ($10,000.00) Dollars to put said plant in operation before August 1, 1934, and that it will further be necessary for said plaintiff to contract with its customers in Europe to purchase its fish flour.

That affiant has made an examination of the reports of the Fish and Game Commission and has read the statement of Mr. N. B. Scoffield in the Thirtieth Bienn-al Report of the California Fish and Game Commission at page twenty-three, wherein he stated:

"On the other hand, the straight canning business apparently does not appear to be profitable to all of the canners. Certain canners have informed the undersigned that they are selling their canned sardines for about the cost, or less than cost, of production, and are willing to do this for the profit they are able to make out of the by-products, to wit, fertilizer and oil, which come from the offal of the fish canned and from the 25 per cent of the fish taken into the plant which is allowed by law."

[fol. 52] And again in the Thirty-Second Biennial Report of the Fish and Game Commission at page sixty-seven, Mr. Scoffield stated the following:

"In our last biennial report we told of how the fish reduction act of 1929, which permits canners to use 32½ per cent of the sardine catch for reduction purposes, stimulated the canning of sardines in order that the larger profit might be made on the percentage used for reduction, until the sardine catch of the season of 1929-1930 reached the unprecedented amount of 322,600 tons, and this in spite of the fact that a closed season was established which was designed to reduce the catch 20 per cent. The theory, that the sardine catch would be limited by the amount of canned sardines the markets would absorb, did not work. The price of canned sardines had declined still further below the cost of production and the market for the so-called by-products, oil and meal, had experienced a decided slump."

That the action of defendants in restraining and in endeavoring to secure an injunction against plaintiff to cause it to discontinue the use of fish flour for human consumption, will work a great hardship upon plaintiff and will deprive it from the free and unrestricted use of its property and injure their manufacturing business to such an extent as to ruin and deprive it entirely of its said business and will throw said corporation into bankruptcy.

That at no time has plaintiff shipped or intermingled any of its fish flour with intrastate commerce of the State of California; that affiant knows of her own knowledge that none of the fish delivered to plaintiff's plant during the past season were caught within the waters of the State of California.

Other than this affiant sayeth not.

Y. Worrall.

Subscribed and sworn to before me this 27th day of April, 1934.

C. R. Holton, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[fol. 53] EXHIBIT "A" TO AFFIDAVIT

San Francisco, California,
October 9, 1933.

M. S. "Excellent" and Owners,
Seattle, Washington.

GENTLEMEN:

The undersigned company agrees to take sardines from your boat for the season September, 1933, to March 1, 1934. The price of sardines will be at market price per ton, with a minimum of $6.00 per ton delivered at our Point San Pablo plant; it being understood that your boat is fully equipped with purse seine net, turn table, and any other necessary gear.

Ordinarily you will not be required to fish under a limit but should conditions necessitate a limit occasionally it will not be less than fifty tons. We agree to take fish from you continuously up to the limit of our permit from the State of California subject, of course, to machinery breakdowns,

Sunday fishing at our option. It is understood that you will proceed to San Francisco immediately upon receipt of this letter.

Kindly acknowledge the duplicate copy of this letter and return in the enclosed self addressed envelope.

Bayside Fish Flour Company, Y. Worrall, Assistant-Secretary.

Accepted. M. S. "Excellent" and Owners. Mike Chaleto.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT FOR INJUNCTION—Filed May 28, 1934

Come now the above-named defendants and move the Court to dismiss the Bill of Complaint for Injunction upon the ground that the Court has no jurisdiction of this action and that said Bill does not state facts sufficient to constitute a cause of action or ground for complaint against these defendants or either of them, or to entitle plaintiff to any relief by injunction or otherwise.

Wherefore defendants pray that said Bill be dismissed and that no injunction, temporary or permanent, be issued herein.

U. S. Webb, Attorney General of California; Ralph O. Marrow, Deputy Attorney General; Darwin Bryan, Deputy Attorney General, Attorneys for Defendants.

[fol. 55] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Fish and game can only become the subject of private ownership in a qualified way and never the subject of commerce except with the consent of the State. The people can regulate fish and game upon such terms as they choose and this power is a valid exercise of police power.

Geer v. Connecticut, 161 U. S. 519.

Paladini v. Superior Court, 178 Cal. 369.

People v. Stafford Packing Co., 193 Cal. 458.

People v. Monterey Fish Products, 195 Cal. 548.
Ex Parte Bailey, 155 Cal. 472.
Ex Parte Kenneke, 136 Cal. 527.
Ex Parte Maier, 103 Cal. 476.
Suttori v. Packham, 48 Cal. App. 88.
In re Phoedovius, 177 Cal. 238.
People v. Truckee Lumber Co., 116 Cal. 397.

The principle set forth above is applicable to sea products caught upon the high seas beyond the three-mile limit of State jurisdiction and sought to be brought into or transported over portions of the State which have been subjected to statutory regulation affecting the taking possession and sale of fish and other marine products.

See—

Van Camp Sea Food Co. v. Dept of Natural Resources, 30 Fed. (2d) 111.
Silz v. Hesterberg, 211 U. S. 31.
Ex Parte Maier, supra.
[fol. 56] In re Delininger, 108 Fed. 623.
Union Fisherman, etc. Co. v. Schoemaker, 36 Ore. 16; 193 Pac. 476;
23 Corpus Juris. 628.
Pacific Steam Whaling Co. v. Alaska Packers Assn., 133 Cal. 632.
Phelps v. Racey, 19 Am. Rep. 140.
Roth v. State, 37 N. E. 259.
State v. Schuman, 58 Pac. 661.

The provisions of the statute in question do not violate that provision of the Constitution of the United States which authorizes Congress to regulate commerce among the states where the power to regulate the use of fish is exercised in good faith and for the purposes of conservation and not for the purpose of evading the commerce clause or other provisions of the Federal Constitution.

Phelps v. Racey, supra.
Roth v. State, supra.
Geer v. Connecticut, supra.
Van Camp Sea Food Co. v. Dept. of Nat. Resources, supra.

The statute in question is not discriminatory for the reason that there is a natural intrinsic distinction between

the business of reducing fish and the business of packing fish, as defined in the Fish and Game Code.

[fol. 56a] A statute cannot be declared unconstitutional on the theory that inasmuch as the Legislature has not expressly prohibited discrimination between applicants the Commission may therefore favor one over others and might perhaps create a monopoly by granting a permit to one person to take all the available fish.

Monongahela Bridge v. United States, 216 U. S. 117.
People v. Globe Grain & Milling Co., 211 Cal. 121.

The wild game within a state belongs to the people in their collective sovereign capacity; it is not the subject of private ownership except insofar as the people may elect to make it so; they may, if they see fit, absolutely prohibit the taking or any traffic or commerce in it, if deemed necessary for its protection or preservation or the public good.

Ex parte Maier, supra.
Geer v. Connecticut, supra.

The protection and preservation of game have been secured by law in all civilized countries and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the Legislature to determine, and courts can not review its discretion.

Phelps v. Racey, supra.

[fol. 57] When fish are caught in another state and brought into and mingled with and become a part of the mass property of the state, they become subject to the laws thereof, and plaintiff, having imported them with knowledge of the existence of such law, must suffer the penalties which it prescribes.

State v. Schuman, supra.

Also:

Roth v. State, supra.
Svenson v. Engelke, 211 Cal. 500.

Dated May 28, 1934.

Respectfully submitted, U. S. Webb, Attorney General; Ralph O. Marron, Deputy Attorney General; Darwin Bryan, Deputy Attorney General, Attorneys for Defendants.

Due service of the within Motion to Dismiss and Memorandum of Points and Authorities admitted this 28th day of May, 1934.

Roy Daily, Attorney for plaintiff.

[File endorsement omitted.]

[fol. 58] In United States District Court for the Northern District of California

Equity

3721-S

Bayside Fish Flour Company, a Corporation, Plaintiff,

vs.

J. Dale Gentry, Earl B. Gilmore, I. Zellerbach, Thomas D. Johnston, U. S. Webb and John L. Farley, Defendants

Roy Daily, Esq., Attorney for Plaintiff, 625 Market Street, San Francisco, California.

U. S. Webb, Esq., Attorney General, Attorney for Defendants, 640 State Building, San Francisco, California.

Before Wilbur, Circuit Judge, and St. Sure and Kerrigan, District Judges

Opinion—Filed Aug. 31, 1934

St. Sure, District Judge:

Plaintiff is a corporation engaged in the business of manufacturing, under a patented process, fish flour from sardines caught on the high seas beyond the three-mile limit of the State of California. Its plant is located at Point San Pablo, this State. Suit is brought by plaintiff against members of the Fish and Game Commission, its executive officer, and the Attorney General, all officers of the State, to enjoin the execution of certain provisions of Act 2870, establishing a Fish and Game Code (Stats. 1933, p. 394; Deering Supplement 1933, p. 1418), revising and consolidating the law of California relating to fish and game and other wild life, and containing, among other things, com-

mercial fishing regulations. Under the provisions of the Code, a license was issued to the plaintiff by the State "to can, cure, preserve or pack fish which are taken in the waters of this state, or fish brought into this State in a fresh condition, or to manufacture fish-scrap, fish-meal, fish-oil, chicken-feed or fertilizer from fish or fish offal, or to deal in mollusks or crustaceans by wholesale."

[fol. 59] The sections of the code involved read as follows:

"1064. Waste. It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this state, or brought into this state, or to take, receive or agree to receive more fish than can be used without deterioration, waste, or spoilage. Except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a reduction process."

"1065. Sardines. Sardines may be taken for use in a reduction plant, or by a packer, only in accordance with the provisions of this article, as follows: In districts 4, 4-¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter pound or square cans less than 10 ounces in net weight; provided, that in a ten ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans."

"1076. Nuisance. Any reduction plant in which any fish or any part thereof is used in violation of the provisions of this article, or in violation of any rule, regulation or order of the commission, is a nuisance. Whenever the existence of such nuisance is shown to the satisfaction of the superior court of the county in which the reduction plant is situated, by complaint filed in the name of the people of the State of California, the court may issue a temporary injunction to abate and prevent the continuance or recurrence of such nuisance. If the existence of a nui-

sance is established in an action, as provided herein, an order of abatement shall be entered as part of the judgment in the case, which order shall direct the closing, for twelve months, of the building or place where such nuisance was maintained, and, during such time, said building or place shall be and remain in the custody of the court."

Plaintiff alleges in its bill "that the construction placed by the Fish and Game Commission upon Sections 1064, 1065 and 1076 violates the Fourteenth Amendment to the Constitution of the United States, in that the People of the State of California will not permit this plaintiff to manufacture a product for human consumption by a reduction process either with or without a permit"; that said sections prohibit plaintiff from taking and using sardines unless it operates a canning or packing plant within the state, but permit other residents, to-wit, packers or "canners of one-pound oval cans," to use unlimited quantities of sardines taken from the waters of the state or from the ocean beyond the three-mile limit; that plaintiff may only take and use sardines in unlimited quantities provided it put them in tin cans, and plaintiff is forbidden to put sardines, after process, in flour sacks; that plaintiff has been threatened [fol. 60] with arrest, its contracts with fishermen frustrated, its reduction plant closed, and as a consequence, plaintiff has suffered great and irreparable injury.

It is contended that the statutes above mentioned violate the commerce clause (Article 1, Section 8, Clause 3) and the Fourteenth Amendment to the Constitution of the United States, and also those certain provisions of the State Constitution relative to deprivation of property without just compensation, special privileges and immunities, and uniformity of laws.

The arguments of plaintiff, namely, that the statutes interfere with and place a burden upon interstate commerce; that the execution of the statute deprives plaintiff of property without due process of law; that those taking and using fish, as does plaintiff, acquire the right to private ownership and the protection of the commerce clause; that the statute has no relation to the conservation of the natural resources of the state, nor was it passed by the legislature in the proper exercise of the police power; were all presented, considered, and decided adversely to plaintiff's

contentions by the Circuit — of Appeals of this Circuit in Van Camp Sea Food Co. v. Department of Natural Resources, 30 Fed. (2d) 111, and cases cited therein; see also Paladini v. Superior Court, 178 Cal. 369; People v. Stafford Packing Co., 193 Cal. 719; People v. Monterey Fish Products Co., 195 Cal. 548; Ex parte Bailey, 155 Cal. 472; Ex parte Kenneke, 136 Cal. 527; Ex parte Maier, 103 Cal. 476; Suttori v. Peckham, 48 Cal. App. 88; In re Phoedovius, 177 Cal. 238; People v. Truckee Lumber Co., 116 Cal. 397.

When a legislative enactment is attacked upon the ground that it is arbitrary, unreasonable, and discriminatory, and constitutes special legislation, violating the prohibition of both the state and federal constitutions, all presumptions and intendments are in favor of the reasonableness and fairness of the legislation, and the decision of the legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. People v. Monterey Fish Products Co., supra.

Section 1060 of the Code defines reduction plant and [fol. 61] packer as follows:

"(a) 'Reduction plant' means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products.

"(b) 'Packer' means any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking."

Plaintiff alleges in its bill that it is in the exclusive business of purchasing fresh or raw sardines and manufacturing therefrom an edible product known as fish flour.

Under the definition (a) above quoted plaintiff is in the business of reducing fish, is operating a reduction plant. It would therefore appear that the statute in question is not discriminatory, for, as suggested by the Attorney General, there is a natural intrinsic distinction between the business of reducing fish and the business of packing fish as defined in the Fish and Game Code.

The motion to dismiss the bill of complaint will be granted.

Dated August 31, 1934.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS—Filed Aug. 31, 1934

Ordered that defendants' motion to dismiss the bill of complaint herein be and the same is hereby granted.

Dated August 31, 1934.

Curtis D. Wilbur, United States Circuit Judge; A. F. St. Sure, United States District Judge; Harold Louderback, United States District Judge.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER VACATING ORDER OF AUG. 31, 1934, AND GRANTING MOTION TO DISMISS—Filed Sept. 1, 1934

Whereas Honorable Curtis D. Wilbur, United States Circuit Judge; Honorable Frank H. Kerrigan, United States District Judge, and Honorable A. F. St. Sure, United States District Judge, constituted a three-judge statutory court for the hearing of and did hear the above entitled suit; and

Whereas through inadvertence Honorable Harold Louderback, United States District Judge, on August 31, 1934, signed an order of this court dismissing the bill of complaint herein, which order should have been signed by Honorable Frank H. Kerrigan, United States District Judge; now therefore it is hereby

Ordered that the order heretofore made and entered on August 31, 1934, granting defendants' motion to dismiss the bill of complaint herein, be and the same is hereby vacated and set aside: and upon further and due consideration it is

Ordered that defendants' motion to dismiss the bill of complaint herein be and the same is hereby granted.

Dated September 1, 1934.

Curtis D. Wilbur, United States Circuit Judge; A. F. St. Sure, United States District Judge; Frank H. Kerrigan, United States District Judge.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL—Filed Oct. 2, 1934

To the Honorable Curtis D. Wilbur, Circuit Judge, and A. F. St. Sure and Frank H. Kerrigan, District Judges, composing said Court:

Now, come the Bayside Fish Flour Company, a corporation, plaintiff in the above entitled cause, and conceiving itself aggrieved by the order and decree made and entered by the above named Court in the above-entitled cause on the 1st day of September, 1934, wherein, among other things, said Court, composed of Judge Curtis D. Wilbur, Circuit Judge, Judge A. F. St. Sure and Judge Frank H. Kerrigan, Districts Judges, under Section 266 of the United States Judicial Code, denied the plaintiffs' application for an interlocutory injunction in said cause and granted defendants' motion to dismiss bill of complaint herein, do hereby appeal to the Supreme Court of the United States from said order and decree, and especially that portion of it denying and refusing the plaintiffs' application for an interlocutory injunction and granting defendants' Motion to Dismiss, all of which reasons are set forth in the assignment of errors which is filed herewith. In view of the fact that complainant will sustain irreparable harm and damage by reason of the failure and refusal of said Court to grant it an interlocutory injunction, this complainant prays that this, its petition for appeal may be allowed; and that an order be made by said Court pending said appeal in the Supreme Court of the United States, granting the tem-
[fol. 65] porary injunction pending the hearing and determination of said cause on appeal to the Supreme Court of the United States.

Complainants further pray that a transcript of the record proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

Dated this 2nd day of October, 1934.

Roy Daily, Attorney for Bayside Fish Flour Co.

[fol. 66] IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

POINTS AND AUTHORITIES ON PETITION FOR APPEAL

L. O. Johnson vs. E. J. Haydel, 278 U. S. 16, 73 L. Ed. 155:

One whose business will suffer great and irremediable loss by the enforcement of a statute which is alleged to be unconstitutional is entitled to a temporary injunction against the enforcement of the act, pending a suit to test its constitutionality.

Roy Daily, Attorney for Plaintiff.

Receipt of copy of the within Petition for Appeal and points and authorities acknowledged October 2, 1934.

U. S. Webb, Attorney General; Ralph O. Marrow(?) Deputy; Darwin Bryan, Deputy, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 67–74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 2, 1934

Now, come plaintiff, Bayside Fish Flour Company, a corporation, and files the following assignment of errors upon which it will rely on its appeal from the decree made by this Court on the 1st day of September, 1934, in the above entitled cause:

1. The Court erred in denying the plaintiff's application for an interlocutory injunction.

2. The Court erred in granting defendants' Motion to Dismiss bill of complaint.

3. The Court erred in not granting an interlocutory injunction to the plaintiff on its application therefor.

4. The Court erred in holding that defendants Motion to Dismiss should be granted.

5. The Court erred in not holding that the plaintiff was entitled to the interlocutory injunction applied for.

Roy Daily, Attorney for Plaintiff.

Receipt of copy of the within Assignment of Errors acknowledged October 2, 1934.

U. S. Webb, Attorney General; R. O. Marrow, Deputy; Darwin Bryan, Deputy, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Oct. 8, 1934

This day this cause came on to be heard on the application of the Plaintiff in the above entitled cause for an appeal to the Supreme Court of the United States from the decree rendered in this cause by three Judges denying the plaintiff's application for an interlocutory injunction and granting defendants' Motion to Dismiss Bill of Complaint.

It is ordered, adjudged and decreed that said appeal be and is hereby allowed provided the plaintiff shall execute and file in this cause a bond to be approved by the Clerk of this Court in the penal sum of ($250.00) Two Hundred and Fifty Dollars, payable to the State of California, conditioned as provided by law.

Ordered, adjudged and decreed, this the 2d day of October, 1934.

Curtis D. Wilbur, Circuit Judge; A. F. St. Sure, District Judge; Frank H. Kerrigan, District Judge.

[File endorsement omitted.]

[fols. 76 & 77] Bond on Appeal for $250.00, approved and filed Nov. 23, 1934, omitted in printing.

[fol. 78] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 8, 1934

Appellant and plaintiff in error deem that the parts of the record hereinafter referred to are necessary for a proper consideration of the case.

1. Original Bill of complaint with exhibits thereto.
2. Decree of district judge, dated September 1st, 1934, granting defendants and appellees motion to dismiss bill of complaint.
3. Opinion of the three judge court dated August 31, 1934.
4. Order of the three judge court dated August 31, 1934, granting defendants and appellees motion to dismiss the bill of complaint.
5. Defendants and appellees motion to dismiss.
6. Each and every affidavit offered by the appellant and plaintiff in error, with exhibits thereto.
7. Petition for appeal and decree allowing the same.
8. Bond and assignment of error.
13. All illustrative charts and tables used at the hearing of the motion for temporary injunction.

Roy Daily, Attorney for Appellant and Plaintiff in Error.

(Endorsed:) Receipt of a copy of the within parts of record which appellant deems necessary for the consideration thereof is hereby admitted this 8th day of October, 1934.

U. S. Webb, Ralph O. Marron, Darwin Bryan, Attorneys for Defendants and Appellees.

[File endorsement omitted.]

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] Citation in usual form showing service on U. S. Webb et al., filed Nov. 27, 1934, omitted in printing.

Endorsed on cover: File No. 39,299. N. California, D. C. U. S. Term No. 2. Bayside Fish Flour Company, Appellant, vs. J. Dale Gentry, Earl B. Gilmore, I. Zellerbach, et al. Filed January 29, 1935.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 671

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

ROY DAILY,
Counsel for Appellant.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1

TABLE OF CASES CITED.

Foster Fountain Packing Company v. Haydel, 278 U. S. 1	7
Johnson v. Haydel, 278 U. S. 16	4

STATUTES CITED.

Act of the California Legislature of April 11, 1933, in effect August 21, 1933, Sections 1060, 1064, 1065 and 1076	2, 7
Constitution of the United States, Article I, Sec. 8, para. 3	3
Article I, Sec. 10	3
Article IV, Sec. 2, par. 1	4
14th Amendment	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 671

BAYSIDE FISH FLOUR COMPANY,
A CORPORATION,

Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, U. S. WEBB AND JOHN L. FARLEY.

STATEMENT OF APPELLANT AND PLAINTIFF IN ERROR AS TO JURISDICTION ON APPEAL UNDER PARAGRAPH 9, RULE 11—POINTS ON WHICH IT EXPECTS TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.

POINT 1,

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act are in contravention of and violate the Fourteenth Amendment to the Constitution of the United States, in that said act, and each and every section thereof and espe-

cially the sections hereinbefore specifically enumerated, deprive appellant and plaintiff in error of its property without due process of law, and deny to the plaintiff in error and appellant the equal protection of the law.

POINT 2.

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act, as enforced and construed by the officers of the State of California, charged with the enforcement of said act, are in contravention of and violate the Fourteenth Amendment to the Constitution of the United States, in that said act and each and every section thereof, and especially the sections hereinbefore specifically enumerated, deprive appellant and plaintiff in error of its property without due process of law, and deny to the plaintiff in error and appellant the equal protection of the law.

POINT 3.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act, violate paragraph three (3) Section eight (8), Article One (1) of the Constitution of the United States, known as the Commerce Clause of the Constitution of the United States.

POINT 4.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every

section thereof, and especially sections 1060, 1064, 1065 and 1076 of said act, as enforced and construed by the officers of the State of California, charged with enforcement thereof, are in contravention of and violate paragraph three (3), Section eight (8), article one (1) of the Constitution of the United States, known as the Commerce Clause of the Constitution of the United States.

POINT 5.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065 and 1076 of said act, are in contravention of and violate paragraph one (1), Section ten (10), article one (1) of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts.

POINT 6.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065 and 1076 of said Act, as enforced and construed by the officers of the State of California, charged with enforcement thereof, are in contravention of and violate paragraph one (1), Section ten (10), article one (1) of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts.

POINT 7.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and

every section thereof, and especially sections 1060, 1064, 1065, and 1076 of said Act, and each of them, are in contravention of and violate paragraph one (1), Section two (2), article four (4) of the Constitution of the United States, providing that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States.

POINT 8.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 14, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065, and 1076 of said Act, and each of them, as construed and enforced by the officers of the State of California charged with enforcement thereof, are in contravention of and violate paragraph one (1), Section two (2), article four (4), of the Constitution of the United States, providing that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States.

POINT 9.

The three-judge court should have granted the application of appellant and plaintiff in error for an interlocutory injunction pending the hearing under the pleadings and proof in the case. Their failing and refusing to do so was error and against the decision of *Johnson* v. *Haydel*, 278 U. S. 16.

POINT 10.

The record discloses serious questions of law arising under the Federal Constitution and serious questions of discrimination supported by affidavits that the plaintiff in error and appellant will and is sustaining serious and irrep-

arable harm and injury by reason of the failure of the three-judge court to grant the application of appellant and plaintiff in error for an interlocutory injunction pending the hearing. It was, therefore, error not to grant the application of appellant and plaintiff in error.

POINT 11.

The granting of an interlocutory injunction prayed for by appellant and plaintiff in error was required in order to prevent appellant and plaintiff in error from suffering irreparable harm and injury pending the hearing and determination of the validity of the California act complained of and each section thereof as being in violation of the Federal Constitution of the United States hereinbefore referred to, in view of the seriousness of the alleged charges in respect to the invalidity of said act and the especial sections thereof hereinbefore set out, and in view of the uncontradicted affidavits filed in support thereof, and in view of the irreparable harm, injury and damage which the appellant and plaintiff in error will suffer by reason of the enforcement of the act, the three-judge court should have granted the application of plaintiff in error and appellant for an interlocutory injunction pending the hearing and determination in this cause.

POINT 12.

In determining as to the correctness of the action of the three-judge court in failing and refusing to grant to the plaintiff in error and appellant an interlocutory injunction pending the hearing of said cause on the merits, this Court will accept as true the affidavits offered by the appellant and plaintiff in error, in support of the allegations contained in the original bill of complaint.

POINT 13.

In determining as to whether or not the three-judge court committed error in failing and refusing to grant plaintiff in error and appellant an interlocutory injunction pending the hearing and determination of this cause, on final hearing, this Court will consider the affidavits offered by plaintiff in error *de novo*, and will determine for itself as to whether or not the application of appellant and plaintiff in error should have been granted.

POINT 14.

Where a State statute is attacked as being in violation of the Constitution of the United States, and charges of invalidity are made in good faith, and are serious, or where the allegations and proof contain charges of discrimination in the enforcement of the act, and where the plaintiff will suffer irreparable harm, injury and damage by reason of the enforcement thereof, an interlocutory injunction should always be granted pending the hearing and determination of the cause on the merits.

POINT 15.

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed by the Legislature of the State of California in the legitimate exercise of its police powers, but are a mere subterfuge, and as passed and enforced, directly affect and obstruct interstate commerce between the States and foreign countries.

POINT 16.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved

April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed in the exercise of any legitimate police power of the State of California, but as passed and enforced were intended and do deprive appellant and plaintiff in error of its property without due process of law and deny it the equal protection of the law.

POINT 17.

A State, in the exercise of its police power, can pass no law directly affecting interstate commerce.

POINT 18.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed for the purpose of conserving the natural resources of the State, but passed for the purpose alleged, and in the enforcement and operation thereof necessarily violate the Fourteenth Amendment of the Constitution of the United States, in the particulars hereinbefore set forth, and impose a direct burden upon interstate commerce.

POINT 19.

The three-judge court in refusing to grant to appellant and plaintiff in error a temporary injunction disregarded the rules of law laid down by this Court in the cases *Foster Fountain Packing Company* v. *Haydel*, 278 U. S. 1, and *Johnson* v. *Haydel*, 278 U. S. 16.

POINT 20.

Under the facts in this case and the law applicable thereto the application for interlocutory injunction should have been granted.

ROY DAILY,
Attorney for Plaintiff in Error and Appellant.

(Endorsed:) Receipt of a copy of the within Statement as to jurisdiction on appeal is hereby admitted this 8th day of October, 1934.

U. S. WEBB,
RALPH O. MARRON,
DARWIN BRYAN,
Attorneys for Defendants & Appellees.

Filed Oct. 8, 1934.

E COPY

No. 2

In the Supreme Court of the United States

October Term, 1935.

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, et al.,
Appellees.

STATEMENT AND BRIEF FOR APPELLANT.

ROY DAILY,
115 De Soto Street, San Francisco,
Attorney for Appellant.

THE RECORDER PTG. & PUB. CO., 99 VAN NESS AVE. SOUTH, S. F.

General Index

	Page
Specification of assigned errors intended to be urged	1
Statement grounds of jurisdiction	1-3
Statement of facts	3-11

ARGUMENT

POINT I

The legislature of a state cannot, under the guise of exercising its police power, directly interfere with interstate commerce. 11-13

This court will investigate the record and determine for itself as to whether or not appellants have been deprived of a constitutional right 13, 14

POINT II

Sections 1064, 1065 and 1076 of the Fish and Game Code violate the 14th Amendment of the Constitution of the United States in that plaintiff in error is deprived of its property without due process of law 14, 15

POINT III

Sections 1064 and 1065 of the Fish and Game Code violate the 14th Amendment to the Constitution of the United States in that they deny to the complainant in error the equal protection of the law, if such sections shall be construed as to prohibit the Bayside Fish Flour Company from purchasing and using sardines for the purpose of making a fish flour for use for human consumption in that such construction would deprive them of the equal protection of the law 15-20

POINT IV

The lower court, in passing upon the application for preliminary injunction, disregarded the rules of law of this court stated in the cases of *Foster Fountain Packing Company* vs. *Haydel*, 278 U. S. 1, and *Johnson* vs. *Haydel*, 278 U. S. 16 20-22

Analysis of cases cited in opinion distinguishing them from the case at bar 22-25

Reduction plant, as used in the act, does not apply to products manufactured for human consumption 25

Table of Cases

	Page
Bailey, Ex parte, 155 Cal. 472	24
Buchannan vs. *Worley,* 245 U. S. 861	14
Foster Fountain Packing Co. vs. *Haydel,* 278 U. S. 1	3, 12, 13, 20
Gratz vs. *McKenzie,* 258 Fed. 338	15
Jay Burns Baking Co. vs. *Bryan,* 264 U. S. 504	15
Johnson vs. *Haydel,* 278 U. S. 16	3, 20
Kenneke, Ex parte, 136 Cal. 527	24
La Coste vs. *Dept. of Conservation,* 263 U. S. 545	13
Maier, Ex parte, 103 Cal. 476	24
Marshal, In re, 102 Fed. 323	15
Paladini vs. *Superior Court,* 178 Cal. 369	22
People vs. *Monterey Fish Products Co.,* 195 Cal. 548	16, 19, 23, 25, 26
People vs. *Stafford Packing Co.,* 193 Cal. 719	23
People vs. *Truckee Lumber Co.,* 116 Cal. 397	25
Phoedovius, In re, 177 Cal. 238	25
Royster Guano Co. vs. *Virginia,* 253 U. S. 412	19
St. Louis Cotton Co. vs. *Arkansas,* 260 U. S. 346	14
Suttori vs. *Peckham,* 48 Cal. App. 88	24
Truax vs. *Cougan,* 257 U. S. 312	13, 14
Van Camp Sea Food Co. vs. *Dept. of Natural Resources,* 30 Fed. (2d) 111	22
Weaver vs. *Palmer,* 270 U. S. 402	14

No. 2

In the Supreme Court of the United States

October Term, 1935.

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, et al.,
Appellees.

STATEMENT AND BRIEF FOR APPELLANT.

SPECIFICATION OF ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

The appellant presents to the Court as grounds for review the following assigned errors:

(1) The Court erred in denying the appellant's application for an interlocutory injunction.

(2) The Court erred in granting appellees' "Motion to Dismiss" bill of complaint.

(3) The Court erred in not granting an interlocutory injunction to the appellant on its application therefor.

(4) The Court erred in holding that appellees' Motion to Dismiss should be granted.

(5) The Court erred in not holding that the appellant was entitled to the interlocutory injunction applied for.

STATEMENT GROUNDS OF JURISDICTION.

The original bill of complaint alleged that the defendants are officers of the State of California, charged

with the enforcement of the "Fish and Game Code," revising and consolidating the law relating to fish and game and other wild life, and repealing certain provisions of law therein specified, passed by the 50th State Legislature of the State of California, approved April 11, 1933, and effective August 21, 1933. That the act was in conflict with the constitution of the United States, in the several particulars set out in the bill of complaint, to-wit: the commerce clause of the constitution of the United States; also paragraph 2, article 6 of the constitution of the United States, providing that the constitution of the United States and the laws thereof should be the supreme law of the land; the fourteenth amendment to the constitution of the United States prohibiting any state from depriving any person of life or property without due process of law, and prohibiting a state from denying any person the equal protection of the law (R. 1-19).

A three-judge court, which was duly organized on the hearing of the application for the interlocutory injunction denied the application and granted defendants "Motion to Dismiss Bill of Complaint" (R. 43-50). This order was dated September 1, 1934. Petition for appeal was filed; an order allowing appeal to this court was granted. The order is dated October 2, 1934, signed by the three judges (R. 51-53). The appeal was perfected; assignment of errors will be found (R. 52-53). The points relied on by plaintiff in error are referred to in its "Statement as to Jurisdiction" and at (R. 52). This appeal is prosecuted from the decree of the three-judge court to this court under section 380 U. S. C. A., being section 266, Judicial Code, as amended Feb. 13, 1925,

the material portion of the act being contained in paragraph 380 thereof and followed in the cases of *Foster Fountain Packing Company* vs. *Haydel,* 278 U. S. 1; *Johnson* vs. *Haydel,* 278 U. S. 16, and pertinent authorities cited therein.

STATEMENT OF FACTS.

This suit was begun in the United States District Court, Southern Division of the Southern District of California, by the Bayside Fish Flour Company, a California Corporation, by an original bill in equity filed in said court, wherein the California Fish & Game Commission, the Attorney General and the Commission's Executive Secretary, were made defendants (R. 1).

The defendants constitute the enforcement officers of the State of California charged especially with the enforcement of the laws hereinafter complained of (R. 13).

The bill of complaint which is found at pages 1 to 19 of the record, claimed the jurisdiction of a Court of Equity of the United States on account of threatened, irreparable harm, injury and damage and in a matter wherein the amount involved was over three thousand dollars and was a controversy arising over the constitution and laws of the United States, and specifically all that part of the constitution and laws of the United States as is set out in the bill of complaint on pages 1-5 of the Record.

It is charged that Sections 1060, 1064, 1065 and 1076 of said Fish and Game Code are in contravention of the constitution of the United States, and in support of this proposition set up; that the Bayside Fish Flour Company is engaged in the business of purchasing fresh

or raw sardines from fishermen domiciled in the states of Oregon and Washington and engaged in catching fish upon the high seas of the Pacific Ocean beyond the three-mile limit, and beyond the jurisdiction of, the State of California, and after said fish are brought within the State of California, appellant then manufactures an edible product, to-wit: fish flour for human consumption from the meat of said sardines. That other fishermen also bring their product within the State of California, sell same to tin-canners who ship their product, out of the State of California, in interstate and foreign commerce. That plaintiff only manufactures and sells its product in interstate and foreign commerce. That fish flour and canned sardines are used as food in all parts of the United States and foreign countries, their chief value arises after being packed and shipped in interstate commerce to all parts of these United States and in foreign countries. That this business is centered around Los Angeles, Monterey and San Francisco, there being twenty other plants engaged in the business of canning and processing sardines into cans, fish meal for other than human consumption and fish oil for non-edible purposes.

That sardines have no value as a food product in their natural state and that approximately 97½ per cent of the canned sardines are shipped out of the State of California in both foreign and interstate commerce.

That sardines are a migratory fish, whose real home is unknown, they being found all over the waters from the lower part of Mexico up as far as Alaska and as far west as Japan; and as far as is known to science, the said sardines spawn upon the open seas and are found in

unlimited numbers in the Pacific Ocean outside of the three-mile limit of the State of California.

That the common method of catching sardines is for purse seine boats to go out into the Pacific Ocean and by means of a net, to catch these sardines which are then sold to the canners, where they are cleaned, cooked and packed in cans and sacks and thereafter being shipped to all parts of the world. That in canning the sardines, only about one-half, or the middle section of the fish, is used for canning purposes; the heads, tails and other offal of the sardine is used to manufacture a fish meal, which is a stock and chicken food, and fertilizer, and fish oil, which is used to manufacture soap and fat for many purposes other than for human consumption.

That the Bayside Fish Flour Company is engaged in the business of manufacturing a fish flour, fit for, and used for human consumption, and shipped in interstate and foreign commerce; that it uses all of the flesh of the fish to manufacture its product, and the deleterious matter then is manufactured into fish meal and sardine oil, similar to that used by the tin-canners. That plaintiff contracted with fishermen from other states, of the United States, to-wit: Oregon and Washington, to deliver sardines to its plant during the packing season 1933-1934.

That the Bayside Fish Flour Company had a large plant and equipment of the approximate value of $65,000 and employed a great number of men, and unless the supply of sardines under the terms of the contract attached to the bill of complaint can be obtained and used its business will be destroyed, its plant rendered valueless and its employees thrown out of employment.

That the State of California threatens to interfere with the performance of this contract and to prosecute the Bayside Fish Flour Company, its agents, servants and employees.

That the part of said Fish and Game laws complained of is 1060-a (R. 19-20); 1064 (R. 20); 1065 (R. 20-21), and 1076 (R. 23-24).

That section 1410 (R. 24) provides certain penalties for a violation of said Fish and Game laws.

The bill of complaint shows that Sections 1060-a, 1064, 1065 and 1076 of the Fish and Game Code violates the 14th amendment of the Constitution of the United States for the reason that while the Bayside Fish Flour Company operates a fish-flour plant for the manufacture of a food product within the State of California and is a corporation organized and domiciled in said State, it still is unable to purchase sardines caught upon the high seas and beyond the three-mile limit, and/or jurisdiction of the State of California, because they do not operate a tin-canning plant, and there is no provision made in the law to permit it to secure a permit for the purpose of operating its food processing plant. That therefore the said complainants are denied the rights and immunities as citizens and the equal protection of the law and are deprived of their property without due process of law. That it would be a great hardship on the Bayside Fish Flour Company to change their machinery and equipment over from a fish flour plant and discard same, to a tin-canning plant, and if, and when, said plant was changed to a tin-canning plant the same could only be operated at a great loss, for the primary reason that all

the profit is made from fish meal and fish oil, not used for human consumption (R. 41).

The bill of complaint further shows that only a negligible quantity of the meat of the sardines is conserved for food purposes under the provisions of the Fish and Game Laws, and that only 14.3 per cent of the sardines taken by canners was used to manufacture a food product during the two seasons 1932-1934, and that 85.7 per cent was used for straight reduction purposes to manufacture fish meal and fish oil for other than human consumption (R. 25), and that of this 14.3 per cent put into tin cans between 90 per cent and 97½ per cent was shipped outside of the State of California into interstate and foreign commerce; therefore, only .715 per cent of the tin-canned sardines was used by the people of the State of California for food purposes, while 13.585 per cent was shipped in interstate and foreign commerce. Or, for example, if a tin-canner takes 1000 tons of raw sardines from the waters of the State, he uses 857 tons of sardines to manufacture non-edible fish meal and fish oil and only uses 143 tons in tin cans for edible purposes; he then would ship approximately 135.85 tons, or 95 per cent of said tin cans in interstate and foreign commerce, leaving only 7.15 tons to be used for food purposes by and for the people of the State of California out of the original 1000 tons of raw sardines taken from the waters of the State, or less than .7 per cent of 1 per cent of the original take are for the people of the State.

The bill of complaint further shows that the parties defendant are officers and agents for the State and the Fish and Game Commission of the State of California, charged with the enforcement of the fish and game laws

of the State, and while denying that any part of the law complained of is valid, complainant expressly offered, and did pay, all taxes, licenses, and only take and use sardines in their plant during the open season, and further only used sardines caught upon the high seas and beyond the jurisdiction of the State, and generally offer to do equity as required by the court.

The bill concludes with the prayer that a temporary restraining order issue and that a statutory court of three judges be formed, and that upon a hearing pending the final hearing a temporary injunction issue and that upon the final hearing this injunction be made permanent, and for other and general relief fully set out and requested, as found on pages 18 and 19 of the Record, which bill of complaint is duly signed by the solicitor of record and sworn to by the proper officer of the complainant company, attaching thereto as an exhibit the contract and the full complete act complained of, the contract being found at page 42, and four other agreements, by reference, at page 40, and the law complained of being found at pages 19-24 of the Record.

The defendants only filed a motion to dismiss the bill of complaint, and did not file any answer supported by controverting affidavits (R. 43).

At the hearing of the motion for an injunction pending the final hearing of said cause, the complainants offered proof in the form of numerous affidavits substantiating fully each and every allegation of the bill of complaint, these affidavits being the affidavit of R. L. Daily (R. 26-32); affidavit of Edward David (R. 32-34); affidavit of Joseph G. Gisler (R. 34-35); affidavit of John R. Grigg (R. 35-37); affidavit of E. W. Lockwood (R.

38); affidavit of E. T. Meekin (R. 39); affidavit of Y. Worrall (R. 40-43), all of which affidavits taken as a whole show proof of the following facts:

That plaintiff is using a patented process (R-24A) for manufacturing fish flour for human consumption out of sardines and has been operating a plant for the past ten years. That under the fish-and game laws the fish and game authorities were required to issue a permit limiting the tonnage taken for such purposes and that in order to obtain such a permit the commission held quasi-judicial hearings to determine the use plaintiff was making of its product (R. 26-27). That during the year 1930, under the law before it was amended, the people of the State of California filed an action in its courts alleging that plaintiff was operating a reduction plant, which case was decided in favor of this appellant and against the appellee and became final (R. 27-28); that the term "Reduction Plant" was in the same language under the old law as is now contained in the present Fish and Game Code. That during the ten-year operating period plaintiff shipped all of its commodity to Europe and expended approximately $25,000 in building up its good will and stimulating its sales (R. 30).

That according to the usage of the trade "Reduction Plant" was always used and understood to mean products for use for purposes other than human consumption; that plaintiff is the only plant in the State of California manufacturing fish flour for use for human consumption (R. 32-34, 37-39).

That the Fish and Game Commission of the State of California operates a patrol boat to watch the fishermen upon the high seas in order that the fishermen do not

catch sardines within the waters of the State of California within the three-mile coast lines, and that it is practicable for this patrol to keep the fishermen out of the waters of the State of California. That outside of the three-mile limit there are straight floating reduction plants catching and using over fifty thousand tons of sardines per season and manufacturing said sardines into a non-edible product (R. 34-35, 36-37).

That the plaintiff has contracts with fishermen domiciled in the states of Oregon and Washington (R. 40), and that said fishermen only caught their sardines in the Pacific Ocean beyond the three-mile jurisdictional limit of the State of California, and that the only sardines used by plaintiff were taken out of the Pacific Ocean and not from the waters of the State of California. That none of the commodity is used, or intermingled, with intrastate commerce; that the operations of the plant were interfered with and stopped by the people of the State of California (R. 40).

That it is a recognized fact, according to the records of the Fish and Game Commission, that there is no profit in putting sardines in "tin cans" and the straight canners sell their canned sardines at less than cost for the purpose of securing a greater tonnage of sardines to manufacture fish-meal and fish oil from the offal and the 32½ per cent allowed them by law to be used for straight reduction purposes (R. 41).

That at no time has plaintiff shipped or intermingled any of its fish flour with intrastate commerce of the State of California.

The proof showed that the law was a subterfuge enacted from its inception simply for the purpose of

enabling canners to stimulate the canning of sardines at a loss in order that the larger profit might be made on the percentage used for reduction purposes until the sardine catch reached the unprecedented amount of 322,600 tons of sardines; and the theory that the sardine catch would be limited by the amount of canned sardines the markets would absorb, did not work. The price of canned sardines declined still further below the cost of production (R-41).

Upon the hearing in this case the State of California did not offer in rebuttal any evidence of any character or kind but relied solely upon their Motion to Dismiss (R. 43).

After the final hearing was had by the court, a decree was rendered with a written opinion by the court (R. 46-49), the necessary procedure was taken to appeal to this court and this case is here on direct appeal from the decision of statutory court below refusing to grant the relief prayed for in the bill of complaint, that is, refusing to grant the temporary injunction prayed for therein.

ARGUMENT.

POINT I

The Legislature of a State Cannot, Under the Guise of Exercising Its Police Power, Directly Interfere with Interstate Commerce.

It is the contention of plaintiffs in error that the act in question was not passed by the Legislature of the State of California in the exercise of its legitimate police power; that the act in question was not passed with a view to conserving the natural resources of the State; that the act has no relation to the conservation of the

natural resources of the State; that the act is merely a subterfuge, attempted to be clothed with appropriate language which was done to make it appear as a conservation measure, but in fact, it was passed for some ulterior purpose, and in its natural enforcement was intended to and does place a direct burden upon interstate and foreign commerce. In order for this act to be a true conservation measure it should limit the *take* of fish, and not the *use* to which the fish may be put after they are taken from the waters of the State. To use a homely simile, supposing all of the sardines of the State were confined within one enclosure and consisted of 1000 tons of sardines whose yearly propagation amounted to 100 tons, then it would be a conservation measure to permit the TAKING of only 100 tons annually from the fishery and thus conserve the original 1000 tons of sardines for the use of posterity; therefore, how can it be said that such a measure would be a conservation measure if it permitted any person who put the sardines in tin cans to take the whole 1000 tons of sardines from the waters of the State provided they only used 32½ per cent for straight reduction purposes, and in preparing said sardines for canning in cutting off the heads would not use more than 50 per cent of each fish in a reduction plant. It is the TAKING of the sardines from the waters of the State that regulates conservation, and not the USE after the taking, which depletes the species. Any legislation regulating the USE for peoples other than the citizens of the State of California is not to conserve said natural resources for the benefit of the people of the State and its future generations.

The case of *Foster Packing Company* vs. *Haydel*, 278

U. S. 1, and the authorities cited therein, sustain said theory.

The legislative enactment under review bears no relation to conservation of resources. Sardine canners, upon obtaining a license, may use ALL the sardines within their capacity during the open season (R. 21, Sec. 1065). Such canners have no limitation placed upon their tonnage take, and may take all the sardines they want without reservation or restriction, so long as they put a certain percentage in *tin cans* and may ship the entire output out of the State without restriction or reservation; nothing is required to be kept within the State.

Interstate commerce comprises not only shipment of property from one state to another, but also protects the dealings, negotiations and contracts in respect thereto. *Foster Packing Co.* vs. *Haydel,* 278 U. S. 1, 10.

This Court Will Investigate the Record and Determine for Itself as to Whether or Not Appellants Have Been Deprived of a Constitutional Right.

In the case of *Truax* vs. *Corrigan,* 257 U. S. 312, the court used the following language:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court."

In *La Coste* vs. *Department of Conservation,* 263 U. S. 545, this court used the following language:

> "This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or bur-

dens interstate commerce. . . . Regard must be had to the substance of the measure rather than its form."

POINT II

Sections 1064, 1065 and 1076 of the Fish and Game Code Violate the 14th Amendment of the Constitution of the United States in That Plaintiff in Error Is Deprived of Its Property Without Due Process of Law.

The Fish and Game Code of the State of California violates the 14th Amendment of the constitution of the United States for the reason that the Bayside Fish Flour Company is denied the right to purchase sardines from citizens of other states of the United States taken from the Pacific Ocean beyond the jurisdiction of the State of California, during the open season and brought within the State and then sold and transported in interstate and foreign commerce only, unless the Bayside Fish Flour Company shall acquire and operate a tin-canning plant at a loss within the State of California, thereby depriving it of its property without due process of law.

The right to *contract is* property, and is protected by the 14th Amendment to the constitution of the United States. *Truax* vs. *Corrigan,* 257 U. S. 312.

The right of property includes the right to acquire, *use* and dispose of it. *Buchannan* vs. *Worley,* 245 U. S. 861.

The right to contract is property, protected by the 14th amendment to the constitution of the United States. *St. Louis Cotton Compress Co.* vs. *Arkansas,* 260 U. S. 346.

A statute cannot regulate arbitrarily a material to be *used* in the manufacture of beds. *Weaver* vs. *Palmer,* 270 U. S. 402.

A state may not, in the guise of protection of the public, arbitrarily interfere with private business or impose unreasonable, unnecessary restrictions upon them. *Jay Burns Baking Co.* vs. *Bryan, Gov. of Nebraska,* 264 U. S. 504.

As there is no question of the public safety, public health, or public morals and where the prohibited act of the plaintiff is not malum in se, the absolute prohibition, by the State authorities, of the USE of plaintiff's own property cannot be held to be a reasonable exercise of the police power. *In re Marshal.* 02 Fed. 323.

POINT III

Sections 1064 and 1065 of the Fish and Game Code Violate the 14th Amendment to the Constitution of the United States in That They Deny to the Complainant in Error the Equal Protection of the Law, if Such Sections Shall be Construed so as to Prohibit the Bayside Fish Flour Company from Purchasing and Using Sardines for the Purpose of Making a Fish Flour for Use for Human Consumption in That Such Construction Would Deprive Them of the Equal Protection of the Law.

Dealing with the question of the title and use of the State in fish (a natural resource), it only holds the same as trustee for the people of the State, which trust must be administered without discrimination.

In *Gratz* vs. *McKenzie,* 258 Fed. 338 (8th Circuit Court of Appeal), Mr. Justice Garland, as organ of the court, said:

> "Fish, generally speaking, on account of their migratory character and for want of a fixed habitat, are classified as animal ferrae naturae. Their ownership, while they are in a state of freedom is in the State, not as proprietor, but in its sovereign ca-

pacity as the representative and for the benefit of all its people in common and the ownership may not be claimed by any particular individuals."

The leading case in the State of California on this subject, and the case which defined the term "reduction plant" prior to the passage of the present act, and which is deemed to be read in conjunction with the act itself, is the case of *People* vs. *Monterey Fish Products Company,* 195 Cal. 548, wherein it is stated:

"The public policy of this state in its relation to the food fish *within* its waters has been clearly, consistently and unmistakably manifested throughout the history of its fish and game legislation. It aims at the protection and conservation of food fish for the benefit of the present and future generations of the people of the state AND THE DEVOTION OF SUCH FISH TO THE PURPOSES OF HUMAN CONSUMPTION.

"It is plain that the purpose and intent of the act is to prohibit preventable waste of food fish, to discourage, and so far as practicable to prevent, THE USE THEREOF FOR ANY PURPOSE OTHER THAN HUMAN CONSUMPTION AND TO AFFIRMATIVELY ENCOURAGE THE USE THEREOF FOR THIS PURPOSE. With this item of public policy in mind it is apparent that the purpose of the proviso which is here claimed to be unreasonable and discriminatory is to *aid and encourage those who are engaged in* catching and PREPARING FISH FOR HUMAN CONSUMPTION and that no reason exists for the giving of such aid and encouragement to those who are engaged in *diverting* food fish to other uses."

An examination of the reports prepared by the Fish and Game Commission (R. 25) will show in what man-

ner the fish and game laws are only used as a subterfuge for the particular purpose of permitting only plants using "tin cans" to take and use sardines.

The canners first cut their fish and take off their heads and tails, thus fifty (50%) per cent of the entire take is not used for human consumption; then they also take 32½ per cent of the total take of the whole fish and put in their reduction plant, for use for other than human consumption, under Section 1066 (R. 21); then, further, under Section 1068 were granted 6000 tons additional to be used for products other than for human consumption (R. 29).

Thus it will be seen that in two operating seasons the tin-canners took from the waters of the State of California 468,667 tons of sardines. They used 401,577 tons of sardines for purposes other than for human consumption and only used 67,090 tons for human consumption (R. 25).

Of the amount of sardines put in tin cans practically all of it was shipped out of the State (R. 33), and less than one (1) per cent of all the fish put up by the tin-canners were actually used by the people of the State of California and the balance was used and devoted to purposes for other than human consumption, and transported and sold by said canners in interstate and foreign commerce.

Under the construction placed upon the act by the Commission this plaintiff is not permitted to do the same thing with the fish BROUGHT WITHIN THE STATE AND TAKEN UPON THE HIGH SEAS and the Commission refuses to issue a permit to it to manufacture FISH FLOUR FOR USE FOR HUMAN CONSUMPTION to be shipped out of

the State into intrastate and foreign commerce, irrespective of the fact that none of the fish, or commodity becomes intermingled with the commerce of the State of California.

Therefore, it is our contention that the exception contained in Section 1064 (R. 20), "except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a *reduction process,*" is unconstitutional because it prohibits the plaintiff from using a "reduction process" in manufacturing its product. Also, that Section 1065 (R. 21), only permits a packer to use fish in a "reduction plant" used in connection with the operation of a tin-canning plant, while it prohibits this plaintiff from doing the same thing because it does not pack its product in a tin can but only uses a "flour sack."

Both this plaintiff and the "tin-canners" are food manufacturers because they are putting up a product for use for human consumption, and there is no reasonable classification upon which to predicate a distinction between a "tin can" and a "flour sack." The tin-canner is permitted to operate and take all the sardines he wishes WITHOUT LIMIT as to quantity and/or number. The flour-sacker is denied the same right to participate in the distribution of the public domain while the canner, through the assistance of the Commission is permitted to use the law as a subterfuge by putting its fish in a tin-can rather than a flour sack. The erection and operation of a canning plant would have no relation whatever to the conservation of the natural resources, because it would necessarily be contemplated that such commodities would all be shipped in interstate and for-

eign commerce and only a negligible quantity would remain within the State for the use of the people of the State, therefore, the alleged distinction has no relation in any true sense of the legitimate exercise of the police power of the State. AND FURTHERMORE, NONE OF THE FISH USED BY THIS PLAINTIFF IS TAKEN FROM THE WATERS OF THE STATE OF CALIFORNIA, but they are all taken from the high seas of the Pacific Ocean, and in no way shape or form tend to deplete the supply of the fish of the people of the State of California.

In the case of *Royster Guano Co.* vs. *Virginia,* 253 U. S. 412, this court, in part, used the following language:

> "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the *object* of the legislation, so that all persons similarly circumstanced shall be treated alike."

As the Supreme Court of the State of California, in the case of *People* vs. *Monterey Fish Products Company,* 195 Cal. 548, has judicially declared that the purpose and intent of all fish and game legislation is to prevent the use of fish for any purpose other than human consumption and to affirmatively encourage the use thereof for this purpose and further holds that the giving of aid and encouragement to those who are engaged in *diverting* food fish to other uses, it will be seen that the legislative declarations of purpose in its practical operation and construction directly burdens or destroys interstate and foreign commerce, and is only used as a subterfuge to build up class legislation and deprive all the

citizens of the State of California with the equal protection of the law.

POINT IV

The Lower Court in Passing Upon the Application for Preliminary Injunction Disregarded the Rules of Law of This Court Stated in the Cases of *Foster Fountain Packing Company* vs. *Haydel*, 278 U. S. 1, and *Johnson* vs. *Haydel*, 278 U. S. 16.

The allegations of the complaint substantiated by supporting affidavits, uncontradicted, all brought this case within the rules laid down in the two foregoing decisions and the lower court's refusal to grant a temporary injunction was contrary to a rule of equity and was the result of improvident exercise of judicial discretion.

The facts alleged in the complaint, the details set forth in our affidavits and the provisions of the Fish and Game Code to be restrained, showed that the conservation of sardines is only a feigned and not the real purpose of the act. They support the plaintiff's contention that the purpose of the enactment is to prevent the interstate and foreign movement of products manufactured from sardines by this appellant in order to limit that right to tin-canners who do not use their product for the people of the State of California but deal almost entirely in interstate and foreign commerce, and through the subterfuge of operating a tin-canning plant indiscriminately and without limitation, take and use sardines from the waters of the State. The enforcing officers of the State will not allow appellant to take fish from the waters of the State to manufacture a food product but are going further and say we cannot take the

fish upon the high seas and outside their jurisdiction, although we at no time intermingle the raw fish, or the product, with interstate commerce.

We are challenging the validity of the State enactment on the ground that it is repugnant to the commerce clause, is class legislation and that we are not bound by the legislative declarations of purpose, and it is open to us to show that in its practical effect and operations its provisions directly burden and destroy interstate and foreign commerce. As interstate commerce includes more than transportation but embraces all the component parts of commercial intercourse the statute involved operates, not only to discriminate, but directly to burden interstate commerce and is invalid.

All the citations referred to in the opinion of the lower court (R. 46-49), are distinguishable and none of them are essentially like this one. The lower court overlooked the practical operation of the law, and only looked at the legislative declaration of policy. Upon the face of the law it appears to be a conservation measure, while in its practical operation, it is a *destructive* measure, and in its destruction of the natural resources of the State is also building up a class preference; it does not in any manner or form prohibit the manufacture and use of fish products in interstate commerce provided one is a tin-canner. The State does not require that any part of the sardines, or their resulting products, be retained for consumption or use therein. Indeed only a minute part is consumed or used within the State. Consistently with the act all may be, and in fact practically all is sold and used in interstate and foreign commerce. As to such sardines so used, the commodities manufac-

tured therefrom, the protection of the commerce clause attaches at the time of *taking*.

By permitting sardines to be taken and practically all of the products thereof to be shipped and sold in interstate commerce, the State of California necessarily released its hold, and as to the sardines so taken, definitely terminated its control. Such authorization and the taking and using in pursuance thereof put an end to the trust upon which the State is deemed to own or control the sardines for the benefit of its people.

As the sardines used by this appellant were all caught upon the high seas the fishermen acquired an *absolute property right therein,* when this plaintiff purchased such fish from them, it also acquired their title of an absolute property right and was entitled to use said fish in the legitimate channels of commerce and at no time did it intermingle said fish or commodities with the commerce within the State of California, and therefore did not come within the rule of law laid down by the Circuit Court of Appeals, Ninth Circuit, in the *Van Camp Sea Food Co.* vs. *Department of Natural Resources,* 30 Fed. (2d) 111, or any of the other cases cited. Each and every case cited to sustain the opinion is readily distinguishable.

The *Van Camp case,* 30 Fed. (2d) 111, only lays down the rule as to USE where the power is exercised in good faith, and for the purposes of CONSERVATION and not for the purpose of evading the commerce clause or other provisions of the Federal Constitution. It also only applies where a SUBSTANTIAL PART OF THE FISH ARE TAKEN IN LOCAL WATERS OF THE STATE..

The case of *Paladini* vs. *Superior Court;* 178 Cal. 369,

also dealt only with the fish taken *within* the waters of the State, in that case Paladini did not acquire an absolute property right in the fish taken, but only acquired a limited right under a privilege granted by the State. In our case the fisherman acquired an absolute property right in the fish themselves which ownership was transmitted to the appellant.

In *People* vs. *Stafford Packing Co.*, 193 Cal. 719, the court was only interpreting the wrongfulness as an invasion of the property rights of the people of the State of California, i. e., the fish within the borders of the State proper. In this case the fish caught upon the high seas do not belong to the people of the State of California, but to the parties who reduced them to possession, so long as said fish are not intermingled with the fish taken from the waters of the State.

The case of *People* vs. *Monterey Fish Products Co.*, 195 Cal. 548, was incorrectly interpreted by the lower court as being against this appellant, because it shows that the legislative declaration of purpose is to keep the fish within the State of California for the use of the people of the State, and the object of the law is to preserve the fish for the present and future generations, not to permit tin-canners to use a law as a subterfuge to destroy said fisheries. It was decided upon the assumption that the tin-canners were not using the law as a subterfuge and were not wasting the food fish by using the same in a reduction plant for the conversion thereof into fish meal and fish oil, while in the particular case now before this court the affidavits show that the tin-canners are using the law as a subterfuge against the property of the people of the State of California.

In *Ex Parte Bailey,* 155 Cal. 472, only the question of proprietary interest between the people of the town of Santa Monica and the State itself was in issue. We take our fish only from the high seas, and do not take any from the waters of the State of California.

In *Ex Parte Kenneke,* 136 Cal. 527, the quail act specifically inhibited sale, said quail was not to be an article of commerce, and the qualified property was further limited to the particular use and prohibition in interstate and foreign commerce. No such inhibition applies here.

In *Ex Parte Maier,* 103 Cal. 476, the statute places an absolute inhibition upon selling of ANY deer, while the act in question in this case has no such inhibition, and gave to the qualified owner the right of USE the same as all other citizens of the State and did not discriminate, while in the statute now before this court, it only permits the USE by tin-canners, and prohibits any other processer doing exactly the same thing the tin-canner does. Neither are we bringing fish within the State during the closed season, but comply with the law in every respect relative to SEASON, licenses, taxes, and all other requirements.

In *Suttori* vs. *Peckham,* 48 Cal. App. 88, the court limited the decision to fish taken within the waters of the State and Suttori was not the absolute owner of the fish because he only had a qualified right as the ownership of said fish always rested in the people of the State. The people of the State of California have no such ownership in the fish used by appellant because said fish are caught upon the high seas, and contracted and purchased from citizens of other states.

In the *Phoedovius case,* 177 Cal. 238, the statute absolutely prohibited the SHIPMENT of game, while in this case no such inhibition applies. The court defined the sole purpose of the enactment of the protection of game is to protect the game for the use of the people of the State. We are not taking or using any fish from the waters of the State of California and are not depriving the people of any property right, neither are we intermingling our fish with fish caught within the State so as to make it impossible to distinguish between said fish.

In the case of *People* vs. *Truckee Lumber Co.,* 116 Cal. 397, the fish were taken from the waters of the State of California and not from without the jurisdiction of the State, as is done in the case before this court.

The lower court also misconstrued the meaning of "reduction plant" contained in Section 1060 (R. 19), by placing too broad a construction upon said phrase, and entirely overlooked the judicial interpretation of a similar phrase by the Supreme Court of the State of California in the *Monterey Fish Products case,* 195 Cal. 548, where the court defined the same phrase to mean any plant used in the manufacture of products for other than human consumption, and also defined waste to designate and apply to the use of fresh food fish for any other purpose than human consumption.

Also in examining the definition in the act itself, it can readily be seen that the phrase "fish-flour" as used there means a meal for use for other than human consumption, because of the other affiliated products contained in said definition and tracing their further uses in the act itself. Section 1064 (R. 20) uses the phrases "reduction plant" or "reduction process" in connection

with "fish-offal," and every one knows that "offal" appertains to non-edible articles. Section 1066 (R. 21) uses the phrase "reduction-plant" as a plant for the manufacture of non-edible articles. The same interpretation applies in Section 1067 (R. 21), and Section 1068 (R. 21), states that no reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish. The *Monterey Fish Products case,* supra, defines the term waste as "designed to include and to apply to the use of fresh food fish for any purpose other than human consumption.

The facts claimed by appellant, and the practical operation and enforcement of the act by the officers of the State of California directly obstructs and burdens interstate and foreign commerce. Our affidavits substantially and persuasively support the facts alleged; and pending the trial and determination of the case the appellant will suffer, and are suffering, great and irremediable loss if the challenged provisions are enforced, and we believe that it is our right to have a temporary injunction.

It is respectfully submitted that the three-judge court erred in the particulars hereinbefore set out; that the interlocutory order should have been granted and that the decree appealed from should be reversed.

Respectfully submitted,

ROY DAILY,

Attorney for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 2

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
Appellees.

APPELLEES' BRIEF

U. S. WEBB,
Attorney General of the State of California,
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Attorneys for Appellees.

27793 CALIFORNIA STATE PRINTING OFFICE

INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
ARGUMENT—	
I. THE SECTIONS OF THE FISH AND GAME CODE DO NOT DIRECTLY INTERFERE WITH INTERSTATE COMMERCE	2
II. SECTIONS 1064, 1065 AND 1076 OF THE FISH AND GAME CODE DO NOT DEPRIVE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW	5
III. SECTIONS 1064 AND 1065 OF THE FISH AND GAME CODE DO NOT DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAW	7

TABLE OF CASES

	Page
Ex parte Kennke, 136 Cal. 527	8
Fish and Game Code—	
Sections 1060 to 1077	2
Section 1060	7
Section 1068	7
Foster Packing Company vs. Haydel, 278 U. S. 1	3
Jay Burns Baking Co. vs. Bryan, Gov. of Nebraska, 264 U. S. 504	5
People vs. Monterey Fish Products Company, 195 Cal. 548	6
St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 346	5
Van Camp Sea Food Co. vs. Department of Natural Resources, 30 Fed. 2d 111	3
Weaver vs. Palmer, 270 U. S. 402	5

IN THE

SUPREME COURT

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No. 2

BAYSIDE FISH FLOUR COMPANY,
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J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
Appellees.

APPELLEES' BRIEF

STATEMENT OF THE CASE

This is an appeal by appellant, plaintiff in the court below, from a decree of a three judge court granting appellees' motion to dismiss the bill of complaint. (8 Fed. Supp. 67.)

STATEMENT OF THE FACTS

Appellant is a corporation engaged in the business of manufacturing, under a patented process, fish flour from sardines caught on the high seas beyond the three mile limit of the State of Cali-

fornia. Appellant's plant is located at Point San Pablo within the State of California. Appellant brought suit to enjoin the Fish and Game Commission of the State of California, its executive officers and the Attorney General, from executing and enforcing the provisions of the Statutes of 1933, page 394, establishing a Fish and Game Code revising and consolidating the law of California relating to fish and game and other wild life and containing among its provisions certain commercial fishing regulations.

Sections 1060 to 1077 inclusive, Fish and Game Code.

Under the provisions of section 1068 of that code the commission granted to appellant a permit to take and use a certain tonnage of sardines. The action instituted by appellant sought to enjoin appellees from enforcing the terms of such permit and limiting the amount of sardines which the appellant could take and use in its reduction plant.

ARGUMENT

I

The Sections of the Fish and Game Code Do Not Directly Interfere with Interstate Commerce

It is appellant's contention that the sections of the code in question were not passed by the legislature of the State of California in the exercise of

its legitimate police power and that the legislative enactment under review bears no relation to conservation of resources.

In support of this position appellant relies upon the case of

Foster Packing Company vs. *Haydel,* 278 U. S. 1

wherein this court declared unconstitutional the Louisiana Shrimp Act. In that case this court found that the real purpose of the legislation in question was to prevent the raw shrimp from being moved, as had theretofore been done, from Louisiana to a point in Mississippi to be packed and canned and sold in interstate commerce and thus force, through commercial necessity, the removal of the packing and canning industries from the state of Mississippi to the state of Louisiana. A similar contention to that made by Appellant here was made in

Van Camp Sea Food Co. vs. *Department of Natural Resources,* 30 Fed. 2d 111.

In speaking of this contention the court said:

> "The power of the states to protect game and fish within their borders by appropriate legislation is now too firmly established to admit of further controversy. *Geer* v. *Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; *Ward* v. *Race Horse,* 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539; *Ken-*

nedy v. *Becker,* 241 U. S. 556, 36 S. Ct. 705, 60 L. Ed. 1166; *Carey* v. *South Dakota,* 250 U. S. 118, 39 S. Ct. 403, 63 L. Ed. 886; *La Coste* v. *Dept. of Conservation,* 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437.

In the case last cited, the court said: 'The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.' Indeed, the power of the state to prohibit the shipment of game lawfully taken within its borders to points without the state, and to prohibit the possession of game within the state, when shipped from points without the state, has repeatedly been recognized by the Supreme Court. And on the argument of this case it was practically conceded that, for a period of about ten years, the decisions to which we have referred were deemed ample warrant for the legislation and regulations now in question, but it is earnestly insisted that the rule established by these decisions was overthrown and annulled by the recent decision of the Supreme Court in *Foster-Fountain Packing Co.* v. *Haydel,* decided October 13, 1928, 49 S. Ct. 1, 73 L. Ed. With this contention we are unable to agree. The legislation of the state of Louisiana there involved prohibited the shipment of unshelled shrimp to points without the state, and the court found that this prohibition was a mere subterfuge to bring about the removal of packing and

canning industries from the state of Mississippi to the state of Louisiana. The basis for the decision is found in the following paragraph of the opinion: 'The facts alleged in the complaint, the details set forth in plaintiff's affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose. They support plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the State.' ''

II

SECTIONS 1064, 1065 AND 1076 OF THE FISH AND GAME CODE DO NOT DEPRIVE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW

Appellant contends that the operation of the sections in question deprive it of its right to contract with the fishermen to deliver fish to its reduction plant, and that the right to contract is property. In support of this position appellant relies upon:

St. Louis Cotton Compress Co. vs. *Arkansas,* 260 U. S. 346;

Weaver vs. *Palmer,* 270 U. S. 402;

Jay Burns Baking Co. vs. *Bryan, Gov. of Nebraska,* 264 U. S. 504

none of which are in point, for in the instant case we are dealing with a natural resource owned by the people in their sovereign capacity which can become the subject of possession, ownership and use only to such limited extent as the legislature may prescribe. In speaking of this question the Supreme Court of California, in

People vs. *Monterey Fish Products Company*, 195 Cal. 548,

said at page 563:

> "Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose (In re *Phoedovius, supra; Paladini* v. *Superior Court*, 178 Cal. 369 (173 Pac. 588)). 'It is, therefore, evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer.' (*Paladini* v. *Superior Court, supra.*) In section 4 of the act of 1917, *supra* (Stats. 1917, p. 1674), the legislature imposed the following limitations: 'No such fish shall be caught, taken or killed in any manner or at any time except that the person so catching, taking or killing, or having the same in his possession, irrespective of the manner in which they were obtained, shall by such act or possession thereby consent that the title to such fish shall be and remain in the State of California for the purpose of regulating and

controlling the use and disposition of same after such catching, taking or killing, and except that the title to such fish legally taken shall vest in the person so taking or possessing them, subject to the restrictions and provisions of law.' "

III

SECTIONS 1064 AND 1065 OF THE FISH AND GAME CODE DO NOT DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAW

It is appellant's contention that the provisions of section 1064 prohibiting the use of any fish or part thereof in a reduction plant or by a reduction process, except as allowed by the code, discriminates in favor of the packer who packs sardines in tin cans. A reduction plant is defined by subdivision (a) of section 1060 of the Fish and Game Code as

" 'Reduction plant' means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or fishery products or by-products."

Section 1068 of the Fish and Game Code provides:

"The Commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish."

It is apparent from these provisions that the prohibition of the section pertains to all persons in the State of California reducing fish, be such persons canners or straight reductionists, and there is no discrimination against appellant or those similarly situated. In

Ex parte Kennke, 136 Cal. 527,

the Supreme Court of California said at page 528:

> "Wild game belongs to the whole people, and the legislature may dispose of it as may seem to it best, subject only to constitutional limitations against discriminations. Within those limitations the legislature, for the purpose of protecting game, may pass such laws as to it seem most wise; and 'the measures best adapted to that end are for the legislature to determine, and courts cannot review its discretion.' (*Ex parte Maier,* 103 Cal. 476, and cases there cited.)"

The reason for requiring a permit before fish may be reduced and definitely fixing in such permit the limit of fish which may be taken for that purpose, while not requiring such permit in order to pack, cure or can fish, at once suggests itself. The amount of fish which may be taken and used by a reduction or extraction process is practically unlimited by reason of the simplicity and rapidity of operation of such process. On the other hand the process of packing, canning or preserving fish is a more complicated, laborious and slow process and as a result the amount of fish which can be taken

and used by that process is restricted by these factors.

We submit that the action of the lower court in granting appellant's motion to dismiss the bill of complaint was proper and the decree of that court should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California,

RALPH O. MARRON,
Deputy Attorney General,
Attorneys for Appellees.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 2

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
Appellees.

APPELLEES' SUPPLEMENTAL BRIEF

U. S. WEBB,
Attorney General of the State of California,

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TOPICAL INDEX

	Page
STATEMENT OF FACTS	1
HISTORY OF LEGISLATION DEALING WITH REDUCTION	3
THE LEGISLATION IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER AND NOT REPUGNANT TO ANY CONSTITUTIONAL PROVISION	17
THE LEGISLATION DOES NOT DEPRIVE APPELLANT OF THE EQUAL PROTECTION OF LAW	25
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Bayside Fish Flour Company vs. Zellerbach, 124 Cal. App. 564	12
Ex parte Maier, 103 Cal. 476	18, 21
Fish and Game Code—Sections 1010, 1064, 1065, 1068 and 1076	15
Foster Fountain Packing Co. vs. Haydel, 278 U. S. 1	24
Mono Power Co. vs. Los Angeles, 33 Cal. App. 675	27
People vs. Magner, 97 Ill. 320	18
People vs. Monterey Fish Products Co., 195 Cal. 548	10, 26
Silz vs. Hesterberg, 211 U. S. 31	18, 19
Soon Hing vs. Crowley, 113 U. S. 703	26
Statutes of 1917—	
Page 1275	3
Page 1673	4
Chap. 803, Secs. 4 and 7	6
Statutes of 1919—	
Page 1203	7
Chap 551, Secs. 4 and 5	8, 10
Statutes of 1921—page 459	9
Statutes of 1925—	
Page 595	10
Chap. 340, Sec. 4	10
Statutes of 1929—	
Page 901	11, 16
Chap. 525, Sec. 4	11
Chap. 525, Sec. 5	12
Union Fishermen's etc. Co. vs. Shoemaker, 36 Ore. 16, 193 Pac. 476	18, 22
Van Camp Sea Food Co. vs. Department of Natural Resources, 30 Fed. (2d) 111	19

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APPELLEES' SUPPLEMENTAL BRIEF

By permission of this Court Appellees file this supplemental brief in order to more fully review the history of the questioned legislation.

STATEMENT OF FACTS

Appellant is a corporation which was engaged in the business of manufacturing under a patented process fish flour from sardines caught on the high seas beyond the three mile limit of the State of California. It had two reduction plants, one located at Point San Pablo in the County of Contra Costa, the other at the City of Monterey in the

County of Monterey. Appellant was licensed for the season 1933–1934, pursuant to the provisions of Section 1010 of the Fish and Game Code of the State of California, "to can, cure, preserve or pack fish which are taken in the waters of this State (California) or fish brought into this State in a fresh condition or to manufacture fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal, or to deal in mollusks or crustaceans by wholesale." In addition to this license appellant was issued a permit, pursuant to the provisions of Section 1068 of the Fish and Game Code, to take and use by a reduction or extraction process not to exceed eleven thousand (11,000) tons of sardines at both its reduction plants. In violation of the terms of this permit appellant reduced in excess of eleven thousand (11,000) tons, and after exceeding the permitted amount continued the operation and the reduction of fish at both its plants. An action was commenced in the Superior Court of the State of California, in and for the County of Monterey, by the People of the State of California in accordance with the provisions of Section 1076 of the Fish and Game Code, in which action an injunction was issued against Bayside Fish Flour Company prohibiting it from taking and using by a reduction or extraction process any further sardines at its plant in the County of Monterey. No appeal was taken by the Bayside Fish Flour Company from the order granting this injunction. The

present proceeding was commenced in the United States District Court, Southern Division of the Northern District of California, seeking to enjoin the members of the Fish and Game Commission and the Attorney General of the State of California from proceeding in the Superior Court of the State of California, in and for the County of Contra Costa, to abate the reduction plant belonging to the Bayside Fish Flour Company located in that county. The Attorney General had prepared appropriate pleadings and intended to proceed under the provisions of Section 1076 of the Fish and Game Code to abate the reduction plant belonging to appellant and located in Contra Costa County.

HISTORY OF LEGISLATION DEALING WITH REDUCTION

The Legislature of California in 1917 adopted two acts dealing generally with commercial fisheries and the products thereof. The first measure was an act entitled:

> "An act to license canners, curers, preservers and packers of fish and handlers of crustaceans and mollusks, and providing a revenue therefrom for the conservation, propagation and restoration of fish in the State of California, and providing for a record of fish caught or received, and providing penalties for the violations of the provisions thereof, and repealing all acts and parts of acts in conflict therewith."
>
> *Statutes of 1917, page 1275.*

By the first section of this Act all persons engaged in the business of canning, curing, preserving or packing fish caught in the waters of California or brought into California in a fresh condition and those persons engaged in the reduction of fish, or dealing in mollusks or crustaceans by wholesale, were required to procure a license. This Act in general provided for the keeping of a record of fish purchased, the giving of receipts to fishermen delivering fish, the imposition of a privilege tax and the expenditure of the funds collected for inspection and conservation work.

At the same session the Legislature adopted an Act entitled:

> "An act to empower the state market director of California to regulate and control the business of buying and selling fresh fish; to regulate the destruction of food fish; to create a state fish exchange; to license those engaged in marketing fish; to create a state fish exchange fund and a revolving fund; to provide penalties for violations of this act; to investigate and report on the fish industry; and to promote the sale of fish."

Statutes of 1917, page 1673.

Sections 4 and 7 of that Act provide:

> "Sec. 4. It is hereby declared that the ownership and title to all fish found in the waters under the jurisdiction of the state are in the State of California; no such fish shall be caught, taken or killed in any manner or at any time

except that the person so catching, taking or killing or having the same in his possession, irrespective of the manner in which they were obtained, shall by such act or possession thereby consent that the title to such fish shall be and remain in the State of California for the purpose of regulating and controlling the use and disposition of same after such catching, taking or killing, except that the title to such fish legally taken shall vest in the person so taking or possessing them, subject to the restrictions and provisions of law. All fish found in the possession of a person within the State of California shall be presumed to have been taken under the jurisdiction of the state."

"Sec. 7. It shall be unlawful for any one to destroy, or cause or permit to be destroyed any food fish in excess of fifty pounds within one day of twenty-four hours or to divert, or cause or permit to be diverted any food fish to any use other than human consumption, without having first obtained the written consent of the state market director to such destruction or diversion. Consent to such destruction or diversion shall be given only where the applicant establishes to the satisfaction of the state market director that such destruction or diversion is not for the purpose of influencing prices and that reasonable efforts have been made to induce its consumption by the public. Nothing in this section shall be construed to apply:

First.—To the use of food fish by fishermen as bait in the customary manner; and,

Second—To any individual market fisherman who is unable to sell for human consumption fish he has caught, and who within forty-eight hours after the destruction or diversion of said fish shall report to the state market director the number of pounds and varieties of fish and how disposed of. The deposit in the United States mail of a written statement of said facts, properly addressed to the state market director and stamped, shall be accepted as a sufficient report.

Third—To food fish in the possession of canners, curers or packers and which are not suitable for their use and which in consequence are destroyed or diverted to use other than human consumption; provided, that within forty-eight hours after the destruction or diversion of any such fish, the person responsible therefor shall report to the state market director the number of pounds and varieties of fish, reason for destruction or diversion and how disposed of. The deposit in the United States mail of a written statement of said facts, properly addressed to the state market director, shall be accepted as a sufficient report."

Statutes of 1917, Chapter 803, Sections 4 and 7.

It will thus be seen that no direct attempt was made by the Legislature to control reduction as such, though the provisions of Section 7 above quoted limited in an indirect way reduction for purposes other than human consumption. Two years later the Legislature of California passed the first act dealing directly with reduction. At the 1919 session the Legislature adopted an Act entitled:

"An act to conserve the fish supply in California by empowering the fish and game commission to regulate and control the handling of fish or other fishery products for the purpose of preventing deterioration or waste; to establish grades to which the fish or other fishery products offered for delivery to canners or preservers or to the fresh fish market must conform; to make regulations to insure the proper handling and delivery of fish or fishery products to canners, preservers or fresh fish dealers; to regulate and control the use of fish or other fishery products for reduction purposes, and to provide penalties for any violation of any of the provisions of this act."

Statutes of 1919, page 1203.

Sections 4 and 5 of that Act provided:

"Sec. 4. No person, firm or corporation engaged in the business of catching, buying, selling, canning, packing or preserving fish, shall suffer or permit, or cause any preventable deterioration, or wilfully do any act that might cause deterioration or waste of any fish caught or taken within or without the waters of this state and brought into this state, and no person, firm or corporation engaged in the business of catching, buying, selling, canning, packing or preserving fish or other fishery products shall sell or offer for sale or delivery, or deliver any fish or other fishery products, to any reduction plant or divert fish or other fishery products for reduction purposes without first having written permission from the fish and game commission, and no reduction plant shall accept or receive

any fish, other than fish offal, from any person, firm or corporation without such written permission."

"Sec. 5. No person, firm or corporation engaged in the business of taking or catching fish or other fishery products shall take, catch or kill more fish or other fishery products than the boat or boats operated by said person, firm or corporation can handle without preventable deterioration, waste or spoilage, and no person preserving fish or other fishery products shall accept or receive or agree to accept or receive more fish or other fishery products than the canning, packing or preserving plant or plants of such person, firm or corporation can handle without preventable deterioration, waste or spoilage, and no person dealing in fish shall take, catch or kill, accept or receive, or agree to accept or receive, more fish or other fishery products than such person, firm or corporation is able to handle without preventable deterioration, waste or spoilage."

Statutes of 1919, Chapter 551, Secs. 4 and 5.

Section 5 was amended in 1921, Statutes of 1921, page 459, to provide:

"No person, firm or corporation engaged in the business of taking or catching food fish or other fishery food products shall take or catch or kill more fish or other fishery products than the boat or boats owned or operated by said person, firm or corporation can handle and deliver to the fresh fish dealer in a condition fit for human consumption, or to a canner, packer or preserver of fish in a condition fit to be canned or

packed or preserved for human consumption . . . It shall be unlawful for any person, firm or corporation to buy or sell or receive or use any kind or species of fish fit for human consumption for reduction purposes except fish offal; provided, that any person, firm or corporation engaged in taking, catching or dealing in fresh fish or fishery products for human consumption, or any person, firm or corporation engaged in the business of canning, packing or preserving fish for human consumption, desiring to sell or deliver or use in a reduction plant any fish fit for human consumption shall file an application with the fish and game commission setting forth the kind or species and quantity of fish to be sold, delivered or used in a reduction plant. (Here follow procedural provisions for a hearing thereon.) If after hearing evidence upon said application it shall appear that there is no market for the fish referred to in said application and that the taking or using of said fish in a reduction plant will not tend to impair or deplete said species of fish an order may be made by the board of fish and game commissioners granting the privilege to take, catch or kill and deliver to or use in a reduction plant during a calendar month an amount of said fish not to exceed twenty-five per cent of the amount any such applicant, person, firm, or corporation can can or pack or preserve for human food during a calendar month. Said order shall not be granted for a period longer than a seasonal run of said kind or species of fish mentioned in said order."

Statutes of 1921, page 459.

It is to be noted that the term "reduction plant" was not defined by the statute in this act. The Supreme Court of California in 1925 in

People vs. *Monterey Fish Products Co.*, 195 Cal. 548, at 562,

in considering Chapter 551, Statutes of 1919, defined a reduction plant:

> "Having in mind the manifest policy of the act, which is the conservation of fish for the purpose of human consumption, we have no doubt that the expression 'reduction plant', as used therein, is at least sufficiently inclusive to apply to any plant engaged in the reduction of fish into other products which are not intended to be used, and are not in fact used, for human consumption."

At the 1925 session of the Legislature the 1919 act, *supra,* was amended to include therein a definition of the term "reduction plant."

Statutes of 1925, page 595.

That term was defined as follows:

> "(a) Reduction plant—where used in this act, applies to any plant engaged in the reduction of fish into products which are not intended to be used, and are not, in fact, used for human consumption. Any plant where fish are put through a reduction or extraction process shall be deemed to be a reduction plant, and shall be subject to all provisions and limitations of this act, unless a permit shall have been obtained as in this act provided."

Statutes of 1925, Chap. 340, Sec. 4.

It is apparent that under the provisions of these statutes one engaged in reducing fish to products fit for, intended for, and actually used for, human consumption did not come within the regulations dealing with "reduction plants" and was not subject to the restrictive provisions relating to such plants. However, the Legislature of California in 1929, amended the act of 1919 and placed all reduction plants under regulation.

Statutes of 1929, page 901.

Section 4 of the 1919 Act was amended to define a reduction plant as:

> "(a) Reduction plant, where used in this act, applies to any plant engaged in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products."

Statutes of 1929, Chap. 525, Sec. 4.

This definition is much broader in scope than the definition set up by the 1925 amendment and includes plants reducing fish into products intended for, fit for, and actually used for, human consumption. That such was the intent of the Legislature is evidenced by the proviso added to Section 5 of the Act by the 1929 amendment. As amended, that section read in part:

> "provided, further, that the fish and game commission may grant a revokable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and

game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, that no such permit shall be granted unless at least fifty per cent (50%) of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured into such products within the State of California."

Statutes of 1929, Chap. 525, Sec. 5.

Reduction for purposes other than human consumption remained subject to the same limitations and restrictions as had theretofore been imposed. Reduction to products intended for, fit for and actually used for, human consumption was for the first time regulated by the provisions of the 1929 amendments. The present appellant, Bayside Fish Flour Company, operated under this statute and under permits in accordance with the statute although it attacked unsuccessfully the power of the Commission to limit the duration of the permit issued to the Bayside Fish Flour Company.

Bayside Fish Flour Company vs. *Zellerbach,* 124 Cal. App. 564.

All of the legislation dealing with the subject of reduction was repealed and superseded in 1933 by

the Fish and Game Code of the State of California, Statutes 1933, page 394.

Probably actuated by the thought that the conservation of food fish could best be accomplished by eliminating the distinction theretofore drawn between reduction for purposes other than human consumption and reduction for human consumption, the Legislature, in the adoption of the Fish and Game Code, eliminated the distinction and treated all reduction alike. The sections of the Fish and Game Code governing the subject are:

Sec. 1010. "Every person must procure a license for each plant or place of business to engage in the business of:

(a) Canning, curing, preserving or packing fish, taken from the waters of this State or brought into this State in a fresh condition.

(b) Manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal.

(c) Dealing in mollusks or crustaceans by wholesale."

Sec. 1064. "It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this State, or brought into this State or to take, receive or agree to receive more fish than can be used without deterioration, waste or spoilage. Except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a reduction process."

Sec. 1065. "Sardines may be taken for use in a reduction plant, or by a packer, only in

accordance with the provisions of this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter-pound or square cans less than 10 ounces in net weight; provided, that in a ten-ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans."

Sec. 1068. "The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish".

Sec. 1076. "Any reduction plant in which any fish or any part thereof is used in violation of the provisions of this article, or in violation of any rule, regulation or order of the commission, is a nuisance. Whenever the existence of such nuisance is shown to the satisfaction of the superior court of the county in which the reduction plant is situated, by complaint filed in the name of the people of the State of California, the court may issue a temporary injunction to abate and prevent the continuance or recurrence of such nuisance.

"If the existence of a nuisance is established in an action, as provided herein, an order of abatement shall be entered as part of the judgment in the case, which order shall direct the closing, for twelve months, of the building or place where such nuisance was maintained, and during such time, said building or place shall be and remain in the custody of the court."

Fish and Game Code, Sections 1010, 1064, 1065, 1068 and 1076.

Under these provisions all persons desiring to engage in the business of reducing sardines in the State of California must first procure a permit so to do. The Fish and Game Commission is prohibited from permitting any reduction of fish which may tend to deplete the species. The reasons for the restrictions placed upon reduction are at once apparent. The process of reduction is simple and the amount of fish which can be used by such process is greatly in excess of the amount which may be canned or cured in the same period of time. Likewise the demand for canned or cured fish is a factor limiting the take of fish for such purposes, for canned or cured fish may not be diverted to purposes other than human consumption. On the other hand, not finding a market for fish flour for the purpose of human consumption, such flour may be profitably sold and used for stock feed, chicken feed and fertilizer. Indeed this fact was recognized by the Legislature in the 1929 amendment for in empowering the Fish and Game Commission to

issue permits for reduction the Legislature provided that:

> "provided, further, that the fish and game commission may grant a revokable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, *that no such permit shall be granted unless at least fifty per cent (50%) of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured into such products within the State of California".* (Italics ours.)
>
> *Statutes of 1929, page 901.*

It will thus be seen that the entire legislation dealing with reduction has been actuated by the purpose and desire to conserve the food fish of California. Since the adoption of the Fish and Game Code in 1933 all reduction of sardines has been carried on under permits issued without discrimination by the Fish and Game Commission under the authority conferred upon the Fish and Game Commission by Section 1068 of the Code. The Commission determines what tonnage may be

taken without tending to deplete the species and allocates that tonnage among applicants engaged in the reduction business.

THE LEGISLATION IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER AND NOT REPUGNANT TO ANY CONSTITUTIONAL PROVISION

Appellant contends that the statutes in question interfere with and place a burden upon interstate and foreign commerce; that the execution of the statute deprives appellant of property without due process of law; that the statute has no relation to the conservation of the natural resources of the State. In support of its first contention Appellant states that by reason of the fact that all of the fish used by it are brought into the State of California and the products manufactured by it are shipped and sold in interstate and foreign commerce, the enforcement of the provisions of the Fish and Game Code constitute a direct burden upon interstate commerce.

It is to be noted that the legislation does not by its terms purport to in any way affect commerce. If the questioned legislation does affect interstate commerce it does so but indirectly and incidentally. Obviously the legislation was designed to protect and conserve the food fish supply of California. Sardines are migratory and travel in schools. The same school which may be in State waters today

may be found upon the high seas tomorrow and vice versa; nor are there any distinguishing characteristics between sardines caught upon the high seas and those taken within State waters. From a practical standpoint it is impossible to adequately patrol the entire coast line of California to assure that persons operating reduction plants in California will not use therein sardines taken in California waters. In order therefore to adequately protect and conserve the food fish of California the Legislature has regulated the use to which such fish may be put when caught in State waters or brought into this State in a fresh condition.

The right of a State to exclude or prohibit the possession of fish or game during closed seasons notwithstanding the same may have been imported from without the State has been uniformly upheld as a necessary means to protect fish and game within the borders of the State.

Silz vs. *Hesterberg,* 211 U. S. 31;
Ex parte Maier, 103 Cal. 476;
People vs. *Magner,* 97 Ill. 320;

and such prohibition of possession is applicable in the case of fish caught on the high seas.

Union Fishermen's etc. Co. vs. *Shoemaker,* 36 Ore. 16; 193 Pac. 476.

The same rule applies to regulation of the use to which fish are subjected upon being brought into the State.

Van Camp Sea Food Co. vs. *Department of Natural Resources,* 30 Fed. (2d) 111.

In *Silz* vs. *Hesterberg, supra,* this court upheld the validity of a statute of the State of New York which prohibited the possession within that state of imported fish and game during the season when the taking or possession of such fish or game within the state was prohibited. In that case this court said:

> "It is contended, in this connection, that the protection of the game of the State does not require that a penalty be imposed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record of this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations the legisature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor. In other States of the Union such laws have been deemed essential, and have

been sustained by the courts. *Roth* v. *State,* 51 Ohio St. 209; *Ex parte Maier,* 103 California, 476; *Stevens* v. *The State,* 89 Maryland, 669; *Magner* v. *The People,* 97 Illinois, 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country. The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution.

* * *. In the case at bar the interference with foreign commerce is only incidental and not the direct purpose of the enactment for the protection of the food supply and the domestic game of the State. It is provided in the New York statutes that game shall be taken only during certain seasons of the year, and to make this provision effectual it is further provided that the prohibited game shall not be possessed within the State during such times, and owing to the likelihood of fraud and deceit in the handling of such game the possession of game of the classes named is likewise prohibited, whether it is killed within or without the State. Such game may be legally imported during the open season and held and possessed

within the State of New York. It may be legally held in the closed season upon giving bond as provided by the statute against its sale. Incidentally these provisions may affect the right of one importing game to hold and dispose of it in the closed season but the effect is only incidental. The purpose of the law is not to regulate interstate commerce but by law alike applicable to foreign and domestic game to protect the people of the state in the right to use and enjoy the game of the state * * *. For the reason stated we think the Legislature in particulars in which the statute is here complained of, did not exceed the police power of the state nor run counter to the protection afforded the citizens of the State by the Constitution of the United States."

In *Ex parte Maier* (*supra*), the Supreme Court of California in upholding the validity of a similar statute of this state, said:

"The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the closed season and foisted upon the market as game procured without the state, and owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form. And we

know of no good reason why it should not be held to mean what it says. Similar statutes in other states have received a like construction."

In *Union Fishermen's etc.* vs. *Shoemaker* (*supra*), the Supreme Court of Oregon upheld the validity of an Oregon statute which prohibited the possession of salmon caught on the high seas beyond the Columbia River. The opinion in that case ably summed up the principles and reasons for sustaining such legislation, by the following language which appears on page 481 (193 Pacific) of the reported opinion:

"The preservation of fish and game has always been treated as being within the proper domain of the police power; and, consequently, when the lawmakers passed the act of 1919, they legislated concerning a subject which is clearly within the embrace of the police power. *Lawton* v. *Steele,* 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Geer* v. *Connecticut,* 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; *State* v. *Schumann,* 36 Or. 16, 25, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754.

The Legislature, it is true, is not the final judge of the limitations of the police power, and, since the legislative action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon whether they can ultimately pass the judicial test of reasonableness; and yet, it is also true that it is the legislative function primarily to determine the necessity or expediency of measures adopted.

When, however, the courts are called upon to apply the judicial test of reasonableness, they will accord to the Legislature a large discretion in determining, not only what the interests of the public require, but also what measures are necessary for the protection of such interests. "*Lawton* v. *Steele,* 152 U. S. 133; 14 Sup. Ct. 499, 38 L. Ed. 385; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; *Ex parte Mon Luck,* 29 Or. 421, 426, 44 Pac. 693, 32 L. R. A. 738, 54 Am. St. Rep. 804; *Lorntsen* v. *Union Fisherman's Co.,* 71 Or. 540, 547, 143 Pac. 621; *State* v. *Redmon,* 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 409, 12 C. J. 933. Moreover, when applying the test of judicial reasonableness, the presumption is in favor of the reasonableness and validity of the regulation. 12 C. J. 934.

The plaintiffs insist that section 5 of the statute is an unreasonable police regulation, because it is unusual, fails to accomplish its avowed purpose and is unduly oppressive upon individuals 'and the financial resources of the great fishing industry.' That section 5 is unusual may be conceded; but it must also be conceded that the conditions attempted to be met are unusual. It is not unusual to find statutes prescribing closed seasons; nor is it unusual to find the law so framed as to make it unlawful to sell, purchase, or possess game or fish during the closed season, even if originally taken and brought from without the state which enacted the law. As already pointed out, the salmon 'runs' do not occur in all the streams at the same time, and consequently it is impracticable to pre-

scribe the same closed season for all the streams. When legislation is enacted for the protection of fish in the Columbia it must, in order to accomplish its purpose, be framed with reference to conditions found to exist in the waters of that river and it is manifest that section 5 was in fact framed with reference to the conditions existing there; and hence, the provisions of section 5 are unusual only to the extent that the conditions which called for the adoption of the measures were and are unusual.

Of course the state of Oregon has no jurisdiction over the waters of the Pacific Ocean beyond the three-mile line; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three-mile limit unlawful. *The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do this is settled beyond controversy. Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75." (Italics ours.)

Appellant's chief reliance is placed upon

Foster Fountain Packing Co. vs. *Haydel,* 278 U. S. 1.

An examination of that case discloses, however, that it does not support appellant's contention or is in any sense in point. The statute of the State of Louisiana there involved prohibited the shipment of unshelled shrimps to points without the State and the Court found that this prohibition was a

mere subterfuge to bring about the removal of packing and canning industries from the State of Mississippi to the State of Louisiana. The basis for the decision is found in the following paragraph of the opinion:

> "The facts alleged in the complaint, the details set forth in plaintiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose. They support plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the State."

The provisions of the statute and facts involved in the instant case are essentially different from those in the *Foster Fountain Packing Co.* case. Upon its face the legislation in question here indicates that it was passed to conserve the food fish of California.

THE LEGISLATION DOES NOT DEPRIVE APPELLANT OF THE EQUAL PROTECTION OF LAW

There is nothing in the record and nothing in appellant's brief which even suggests that appellant

is, under the provisions of the law, treated any differently, by either the statute or the administration thereof, than other persons engaged in the business of reducing fish. In speaking of the question of discrimination this Court in

Soon Hing vs. *Crowley,* 113 U. S. 703,

said at pages 708, 709:

> "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

The Supreme Court of California, in speaking of the question of classification in the case of

People vs. *Monterey Fish Products Co., supra,*

said at page 556:

> "When a legislative enactment is attacked upon this ground all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action (5 Cal. Jur., sec. 628 et seq., and cases cited), and the decision of the legislature as to what is a sufficient distinction to warrant the classification will not

be overthrown by the courts unless it is palpably arbitrary (Id., sec. 832 et seq., and cases cited)."

To the same effect is

Mono Power Co. vs. *Los Angeles,* 33 Cal. App. 675.

As we have heretofore suggested the ability to dispose of reduced products for purposes other than human consumption indicates a sufficient distinction between that class of persons canning or curing fish which may not be diverted to purposes other than human consumption and those reducing fish.

CONCLUSION

We sincerely hope and trust that we have been able sufficiently to present to this Court not only an understanding of the object and purpose of the legislation and what we so conscientiously believe to be more than ample reasons why it should be upheld and enforced, but also impart an appreciation of the great and vital importance that this case has to the people of the State of California in the preservation and protection of one of their most important and valuable natural resources.

It is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 2.—October Term, 1935.

Bayside Fish Flour Company, Appellant, *vs.* J. Dale Gentry, Earl B. Gilmore, I. Zellerbach, et al.	Appeal from the District Court of the United States for the Northern District of California.

[March 2, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought to enjoin appellees, officers of the State of California, from enforcing certain provisions of the State Fish and Game Code (Statutes of 1933, p. 394, 484 *et seq.*) alleged to contravene the commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. The court below sustained a motion to dismiss the bill, on the ground that it did not state facts sufficient to constitute a cause of action or to entitle appellant to any relief by injunction or otherwise. 8 F. Supp. 67. We are of opinion that this decree must be affirmed.

Appellant is a California corporation engaged in the business of manufacturing, from the meat of sardines, fish flour for human consumption. The sardines are caught by fishermen upon the high seas beyond the three-mile limit to which the jurisdiction of the state extends, sold to appellant, and brought into the state and there reduced to fish flour at appellant's reduction plants. The fish flour is made with the expectation of selling and shipping it in interstate and foreign commerce; and it is so sold and shipped and is used as food in the United States and foreign countries. Sardines are a migratory fish found in great numbers in the Pacific Ocean beyond the three-mile limit as well as within that limit. So far as known, they spawn upon the open seas. In the process of reducing the fish, appellant uses a portion for producing flour for human consumption, the remainder being converted into a meal used for chicken feed, and into fertilizer, fish oil and other non-edible substances.

Sardines caught in the same way are also purchased by packers, who clean, cook, and can or preserve them for human food, using

in that process only a part of the fish and utilizing the remainder for reduction into non-edible products.

The provisions of the Fish and Game Code which appellees threaten to enforce against appellant and those necessary to be considered in that connection are copied in the margin.[1] The bill alleges that appellees will prevent appellant from manufacturing fish flour in its reduction plants while at the same time permitting packers to use sardines, taken from the waters of the state or those outside, in their packing plants.

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[1] Sec. 1010. Every person must procure a license for each plant or place of business to engage in the business of:

(a) Canning, curing, preserving or packing fish, taken from the waters of this State or brought into this State in a fresh condition.

(b) Manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal.

. . . . . .

Sec. 1060. As used in this article:

(a) "Reduction plant" means any plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products.

(b) "Packer" means any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking.

(c) "Fish offal" means the heads, viscera, and other parts of fish taken off in preparing for canning or preserving.

Sec. 1064. It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this State, or brought into this State, or to take, receive or agree to receive more fish than can be used without deterioration, waste or spoilage. Except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a reduction process.

Sec. 1065. Sardines may be taken for use in a reduction plant, or by a packer, only in accordance with the provisions of this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter-pound or square cans less than 10 ounces in net weight; provided, that in a ten-ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans.

Sec. 1066. Any person engaged in canning sardines may take and use in a reduction plant thirty-two and one-half per cent of the amount of sardines actually received at such canning plant during each calendar month.

Sec. 1068. The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish.

Sec. 1070. Persons engaged in preserving sardines by the common methods of drying, salting, smoking or pickling may use in a reduction plant or by reduction process such sardines, or fish delivered mixed with sardines, as are unfit for drying, salting, smoking or pickling, which are not intentionally taken into the plant in a condition unfit for processing for human consumption.

First. There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local. Whether the product is consumed within the borders of the state or shipped outside in interstate or foreign commerce are matters with which the act is not concerned. The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game generally, the state has supreme control. Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz* v. *Hesterberg*, 211 U. S. 31, 39-40.

If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to *Silz* v. *Hesterberg, supra,* pp. 39 *et seq.*, and *Van Camp Sea Food Co.* v. *Department of Natural Resources,* 30 F. (2d) 111, where the decisions are collected.

Appellant places great reliance upon *Foster Packing Co.* v. *Haydel,* 278 U. S. 1. There an act of the State of Louisiana forbade exportation of shrimp from which the heads and hulls or shells had not been removed. The ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose was to prevent the shrimp from being moved as theretofore from Louisiana to a point in Mississippi, where they were packed or canned and sold in interstate commerce, and thus through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The Louisiana act authorized every part of the shrimp to be

shipped and sold in interstate commerce. We held that the state might have retained the shrimp for use and consumption therein; but, having fully permitted shipment and sale outside the state, those taking the shrimp under the authority of the act became entitled to the rights of private ownership and the protection of the commerce clause. It is plain that the decision has no application to the case under review.

Second. The point that the provisions of the Fish and Game Code deprive appellant of its property without due process of law seems to be based upon the contention that appellant is denied the right to contract for the purchase of sardines taken from the high seas and brought into the state. Assuming the point to have been properly raised below, which is by no means clear, it is without merit. Undoubtedly the right to contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth Amendment. *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545-546, and cases cited. Plainly enough, however, that right is not directly interfered with by the legislative provisions in question. Nor, because they may operate indirectly as a deterrent, do they, in the sense of the Constitution, deprive appellant of the liberty of contract. A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.

These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. *McLean* v. *Arkansas,* 211 U. S. 539, 547-548. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, &c. Railroad* v. *Nebraska,* 170 U. S. 57, 77. And see, generally, *Chicago, B. & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549. "Whether the enactment is wise or unwise," this court said in that case (p. 569), "whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Third. Finally, it is said that the provisions of the state code so discriminate between the business of appellant and that of persons engaged in canning or preserving fish, as to deny appellant the equal protection of the laws. Section 1010, *supra*, requires a license for each plant or place of business to engage in (a) canning, curing, preserving or packing fish, etc., and (b) manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal. Section 1060 defines "reduction plant" as a plant used in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil, or other fishery products or by-products; and defines "packer" as any person canning fish or preserving fish by the common methods of drying, salting, pickling or smoking. Section 1064 is a provision intended to prevent deterioration or waste of fish, and specifically provides that, except as allowed by the Code, it shall be unlawful to use any part of the fish except the offal in a reduction plant or by a reduction process. By § 1065, sardines are allowed to be taken for use in a reduction plant or by a packer only in accordance with certain provisions set forth. By § 1068, the State Fish and Game Commission is authorized to grant a revocable permit "subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish." No similar limitation is put upon, or similar power conferred in respect of, packers; and it is the resulting classification which appellant contends contravenes the equal protection clause of the Fourteenth Amendment.

It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation. A particular classification is not invalidated by the Fourteenth Amendment merely because inequality actually results. Every classification of persons or things for regulation by law produces inequality in some degree; but the

law is not thereby rendered invalid (*Atchison, Topeka, &c. Railroad* v. *Matthews*, 174 U. S. 96, 106), unless the inequality produced be actually and palpably unreasonable and arbitrary. *Arkansas Gas Co.* v. *Railroad Comm.*, 261 U. S. 379, 384, and cases cited.

The purpose of the legislation under consideration is to prevent unnecessary waste, and to conserve for food the fish supply subject to state jurisdiction. See *People* v. *Monterey Fish Products Co.*, 195 Cal. 548, 557-559. If the legislature was of the view—as evidently it was—that the process of packing on the whole would not interfere with the effectuation of this policy while the process of reduction would do so, unless carefully limited to prevent excessive operations, we are unable to perceive any reason for saying that such view was without reasonable basis. By the process of packing—that is, canning or preserving—fish, the original form of the edible portions of the fish is not destroyed as it is by the process of reduction, by which those portions are broken down into a loose meal or flour. In the latter case it is obvious that the product may be readily diverted to other purposes than human consumption, such as chicken feed, fertilizer, etc. It is equally obvious that such a diversion is not likely to happen in the case of canning or preserving, where the edible portions retain their original solid form. The state also points out that the process of reduction is simple, and the quantity which can be reduced in a given period of time greatly exceeds what can be utilized by packing, which is a much slower and more complicated process. These differences are enough to bring the classification within the permissible range of state power, so far as the equal protection clause of the Fourteenth Amendment is concerned.

We have considered the arguments of appellant tending to a different conclusion than that which we have reached; but at most these arguments do no more than demonstrate that the question is debatable. And, if so, the effect of the action of the state legislature in passing the statute was to decide this debatable question against the view now advanced by appellant; and since we are unable to say that such a determination by the legislature is clearly unfounded, we are precluded from overturning it. *Radice* v. *New York*, 264 U. S. 292, 294.

Decree affirmed.